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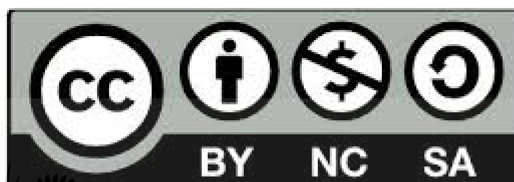

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AN ASSESSMENT OF THE MUTUAL AGREEMENT PROCEDURE AS AN INTERNATIONAL TAX TREATY DISPUTE RESOLUTION REMEDY

by

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ABSTACT

International tax treaties are unique bilateral negotiations effectively breaking down the barriers of international trade while aiming to eliminate double taxation and prevent fiscal evasion. The implementation of these negotiated tax treaties is a matter of domestic law, once concluded a contracting state is free to use domestic legislation to tax the income allocated through the these tax treaties. There is however, no external enforcement of these agreements and as a result disputes occur.

The remedy proposed by both the OECD MTC and the UN MTC is what we know as MAP. MAP is a non-binding, non-compulsory dispute resolution mechanism developed in the early 20th century. Even though many jurisdictions remain of the view the MAP is a successful method of dispute resolution, others feel that it has significant shortcomings as outlined by the JWG established by the OECD in 2003. As a result of the work done by the JWG and in an attempt to address some of the insufficiencies of the MAP the OECD introduced additional articles to the MTC including guidelines on non-binding arbitration. The UN subsequently introduced similar guidelines in its MTC. The introduction of mandatory arbitration into both these MTCs is the most significant development in the resolution of international tax disputes.

However, the increased complexity and volume of international trade undoubtedly results in tax implications that are not currently addressed in tax treaties or conventions. Differences in the interpretation of the underlying facts of those trade transactions may lead to a host of international tax disputes, often resulting in juridical double taxation. With MAP being the only remedy available, this study aims to determine whether or not the MAP in its current form, is an effective international dispute resolution mechanism or whether further developments are still required.

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KEYWORDS:

MAP, Arbitration, Dispute Resolution, Mutual Agreement Procedure, International Tax, OECD, UN, Model Tax Convention

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LIST OF ABBREVIATIONS

ACAP	Accelerated Competent Authority Procedure
APA	Advance Pricing Arrangements
BIT	Bilateral Investment Treaties
EC	European Community
ECOSOC	Economic and Social Council
GDP	Growth Domestic Product
ICC	International Chamber of Commerce
ICJ	International Court of Justice
IFA	International Fiscal Association
IMF	International Monetary Fund
ITO	International Tax Organisation
ITT	International Tax Tribunal
JWG	Joint Working Group
MAP	Mutual Agreement Procedure
MEMAP	Manual on Effective Mutual Agreement Procedure Practices
MTC	Model Tax Convention
NAFTA	North American Free Trade Agreement
NOE	Non-OECD Economies
OECD	Organisation for Economic Co-Operation and Development
PCIJ	Permanent Court of International Justice
SDR	Supplementary Dispute Resolution
UN	United Nations
USSR	Union of Soviet Socialist Republics

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CHAPTER 1 – INTRODUCTION AND METHOD OF STUDY

1.1 BACKGROUND TO THE STUDY

Governments, or States, impose tax on income generated from business activities and capital invested within its jurisdiction (Holmes, 2007, p. 1). This jurisdictional principle of taxation is based on imposition of income tax either as a result of the income's relationship to the source of generation (source principle) or the relationship of the taxpayer to the State within which residence is based (residence principle).

Under the source principle a jurisdiction's right to tax depends on the income generated within its borders. The justification of the principle lies in the responsibility shared by both residents and non-residents to contribute towards the costs required to uphold and maintain the infrastructure that allows for the production of that income (Olivier & Honiball, 2011, p. 11). The source principle is also objective in nature as tax is imposed as a result of the economic boundary within which it is generated, without taking into account the person who derived the income. This principle also links directly to the theory of sovereignty as it assumes that each country establishes its own income tax policy, a right shared by all countries (Figueroa, 2005, p. 380).

Under the residence principle a jurisdiction has the right to tax the worldwide income of any resident in that jurisdiction (Olivier & Honiball, 2011, p. 19). In contrast to the source principle, the principle of residency is subjective in nature as it is supported by social, political scenarios coupled with the interpretation thereof. The jurisdictional principle was initially developed for individuals in the context of the personal income tax (Committee of Experts on International Cooperation in Tax Matters, 2011, p. 12), but as income generating activities became more sophisticated, States started to make use of these principles to establish rules under which they could tax juridical persons. All income tax policies make use of the source principle in establishing the right to tax, while more sophisticated tax systems allow for a State to tax on both the source and residence principles (Committee of Experts on International Cooperation in Tax Matters, 2011, p. 12).

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The establishment of taxing right becomes more onerous when the income generating activities are spread, either as a result of source or residence, across multiple jurisdictions. These could very well result in double taxation. International double taxation can occur in one of two ways, i.e. juridical double taxation and economic double taxation.

The OECD (2010, p. 7) defines juridical double taxation as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods. Economic double taxation can be defined as the imposition of comparable taxes in two (or more) States on two different taxpayers but on the same subject matter for identical periods. Juridical double taxations could occur as a result of the following conflicts:

i. Source-source Conflicts: Two states may simultaneously claim their taxing right on the same income based on their domestic interpretation of the source principle. State A may tax a sale transactions by a resident of State B booked through an office located within its borders, effectively deeming the sale to be sourced in State A. Similarly, State B could also apply the source principle stating the original sale took place before the goods were transferred to the office located in State A and as a result claiming the source to be in State B. Both states would impose a tax leading to juridical double taxation

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ii. Resident-resident Conflicts: Two states may simultaneously tax the same taxpayer (individual or company) on its/his worldwide income due to differences in the legislative definition of a resident. Dual residency could occur as a result of incorporation, management or duration of presence within a state. Resident-resident conflicts arise often as many individuals and corporations qualify for dual residency and thereby providing taxing rights to both resident states.

iii. Source-resident Conflicts: One state may claim its taxing right through the application of the residence principle, taxing a taxpayer on his worldwide income. Some of that income could be generated within another state that would impose taxation of that income due to the source principle. If Company X, resident in State A could have various income generating activities in State B. As Company X is resident in State A, that state would impose taxation on its worldwide income. State B would also impose a tax on State B in order to exercise its taxing right on the income generated within its borders.

When juridical double taxation occurs as a result of the above, the source country would usually provide domestic relief through the provision of a deduction, an exemption or a credit. A deduction allows the taxpayer to claim a deduction on any foreign taxes paid on foreign income received while an exception exempts the foreign sourced income all together. The credit method effectively only taxes a taxpayer to the extent that the resident tax exceeds the foreign tax paid (Olivier & Honiball, 2011, p. 6).

Another method to curb instances of juridical double taxation, is through the use of tax treaties within which either the source state or resident state relinquish some of its taxing rights based on a bilateral negotiation entered into between the two contacting states. Bilateral treaty negotiation is based on a set of standardised principles specifically modelled to allocate taxing rights based on the commercial, industrial and financial activities between two contracting states. These standardised principles are known as a Model Tax Convention (hereafter "MTC") and are published by international organisations (Olivier & Honiball, 2011, p. 268). The most commonly used MTCs are the ones published by the Organisation for Economic Co-Operation and Development (hereafter "OECD") and the United Nations (hereafter "UN").

International tax treaties based on these MTCs are unique bilateral negotiations effectively breaking down the barriers of international trade while aiming to eliminate double taxation and prevent fiscal evasion. The implementation of these negotiated tax treaties is a matter of domestic law, once concluded a contracting state is free to use domestic legislation to tax the income allocated through the these tax treaties. This effectively allows for the continued preservation of sovereignty (Rixen, 2008, p. 8).

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Rixen (2008, p. 10) suggests that the treaty negotiation is a process of cooperation, one that has three states i.e. bargaining, agreement and enforcement. Bargaining would be the negotiation of the treaty terms leading to the agreement, which in itself would represent the concluded tax treaty. The process of enforcement is an afterthought where both contracting states to the treaty have to ensure it adheres to the agreement. There is no external enforcement of the agreement and this is where disputes about the application thereof arise (Rixen, 2008, p. 22). The only remedy included bargaining towards the agreement, is the use of a Mutual Agreement Procedure ("MAP"). MAP is a non-binding, non-compulsory dispute resolution mechanism developed in the early 20th century without any profound or significant evolvement (Altman, 2005, p. 1) until the recent recommendations for non-binding arbitration.

Enforcement of an agreement reached between two contracting states is monitored by the taxpayer, who invariably is a third party to this agreement (Rixen, 2008, p. 25). In the case of juridical double taxation a taxpayer would immediately notice that either contracting state is in violation of the international tax treaty. As a result, the taxpayer would ultimately set the MAP in motion. The functionality of MAP lies in its ability to renegotiate terms of the agreements concluded between contracting states on an *ad hoc* and *ex post* basis and also provides a mechanism to address temporary or unforeseen problems created through interpretation (Aoyama, 2004, p. 653).

As soon as a taxpayer identifies a problem (which, in most cases, would lead to double taxation) he must "present his case to the Competent Authority" (OECD, 2010, p. 36). Each contracting state would employ or empower its own competent authorities who should have the discretion and resources to handle disputes that arise between contracting states. It is also understandable that a mechanism that allows for the *ex post* negotiation of terms or interpretation would not be granted to a third party as contracting states would not want to outsource the enforcement function to a third party (Rixen, 2008, p. 27). However, the purpose of more than 3000 tax treaties, no matter what the conventional basis, is the elimination of double taxation and the facilitation of trade, yet there is no binding enforcement allowing for a compulsory and conclusive dispute resolution mechanism. It can also be questioned whether a binding compulsory dispute resolution mechanism is required.

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Many jurisdictions remain of the view the MAP is a successful method of dispute resolution especially since the application of a tax treaty can be enforced under domestic legislation. Domestic courts could provide a taxpayer with the required protection, which in itself questions whether or not the requirement for a binding dispute resolution mechanism is redundant. However, more than 4,000 different decisions were reached by domestic courts on the interpretation and application of tax treaties. Tax administrators through the guidance of the OECD have always argued that the non-binding MAP is reasonable, while taxpayers and NGOs continuously express their argument that it is insufficient in mitigating double taxation (Altman, 2005, p. 5).

Both the OECD MTC and the UN MTC contain guidelines for a MAP with neither the wording nor interpretation being substantially different. However, the goal of both those conventions, i.e. the elimination of double taxation cannot be achieved because countries entering into tax

conventions don’t always share the same views to the relevant facts or interpretation of the provisions to the conventions (Economic and Social Council, 2005, p. 3).

The majority of MAP cases are initiated by taxpayers and predominantly involve transfer pricing disputes, the allocation of profits to a permanent establishment under Article 7 of a MTC, the existence of a permanent establishment and the appropriate residence of a taxpayer (Ault, 2013, p. 3). If a taxpayer is under the impression that it is taxed in a way that is not in accordance with the substantive rules of the treaty allocating the taxing rights between the two contracting states in question he may represent his case to the Competent Authority where he is a resident. The Competent Authority would first opt to resolve the dispute unilaterally through which it would request additional information from the taxpayer. If the Competent Authority is of the opinion that the request is justified, and it cannot provide for a unilateral solution, it shall enter into a process of mutual agreement with the Competent Authority of the other state (Gildemeister, 2007, p. 1). Together they “shall endeavour” to find a solution (OECD, 2010, p. 37).

The competent authorities determine their own approach to mutual agreement and do not need to take into account the interest of the taxpayer. As a result, it can be concluded without any agreement reached. In addition, the taxpayer is not guaranteed taxation in accordance with the treaty nor can he influence this process in any way. The taxpayer would also have to suspend any domestic tax proceeding in order to avoid a MAP outcome to be contradictory to decisions made by domestic courts. There is also no guarantee that the payment of taxes would be suspended (Gildemeister, 2007, p. 2). When a solution is reached, the taxpayer has the option to either accept or reject the decision. Rejection would open up domestic remedies while accepting the decision would become legally binding.

Historically it has provided for relative effective dispute resolution of the majority of disputes that arise as a result of trade but it is increasingly put under strain and the volumes and complexity of MAP cases have increased sharply and will continue to increase in the future (Economic and Social Council, 2005, p. 3). Given the increase in the complex nature of international tax disputes coupled with political pressure as a result of shrinking tax revenues, there seems to be an increase in the number of MAP without any outcome (Gildemeister, 2007, p. 2)

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As part of an initiative to improve the resolution of disputes through MAP and in an attempt to enhance the transparency under which it is conducted, the OECD launched a dedicated project in 2003. Through this project the collection and annual publishing of MAP statistics was introduced. In 2012, the total number of new MAPs initiated under OECD member countries amounted to 1678 which represents a 73.2% increase since they initiated the data collection in 2006. In this 6 year period the average number of months to complete MAP cases was 23.5 with the average for 2012 being 25.46 (OECD, 2012a).

Number of new MAP cases initiated by reporting period							
	2006	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**
OECD Member Counties	1036	1176	1311	1599	1341	1624	1678
OECD Partner economies	0	0	4	2	5	5	3
Inventory of MAP cases at the end of reporting period							
	2006	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**
OECD Member Counties	2352	2671	2897	3426	3328	3838	4073
OECD Partner economies	0	0	2	4	7	9	9

(OECD, 2012b)

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Even though many believe that the MAP is an effective dispute resolution tool that provides fair decision, the process does have clear imperfections. The process does not provide any adequate procedural rules or time limits in its application (ICC, 2001, p. 2). The experiences of competent authorities are not always equal. This has an effect as knowledge of the domestic legislation of both states is crucial. When a straightforward tax system is up against a more sophisticated one, experience is essential in the negotiation process. In addition, the time and administrative costs incurred in the negotiation process goes to waste if no agreement is reached (Altman, 2005, p. 259)

A MAP only encourages the elimination of double taxation but does not guarantee it therefore disputes could potentially remain unresolved (Economic and Social Council, 2005, p. 6). In addition, one of the reasons why tax treaties are negotiated is for the attraction of foreign investments, when political pressures are considered many jurisdictions simply can’t lose that foreign investment, which could result in an injustice to both the tax administration and the taxpayer (Altman, 2005, p. 257).

In an attempt to address some of the insufficiencies of the MAP the OECD introduced additional articles to the MTC including guidelines on non-binding arbitration (OECD, 2007a,

p. 4), with the UN introducing similar guidelines in its latest MTC. The introduction of mandatory arbitration into both these MTCs remains the most significant development in the resolution of international tax disputes. Compulsory adjudication of international disputes is not a foreign concept as it was suggested as early as 1895 (Burnett, 2008, p. 173) by a German scholar who suggested the establishment of an international tax court (Altman, 2005, p. 75).

It seemed inevitable that the connection between international tax disputes and arbitration be made. Arbitration is a preferred dispute resolution process in many international agreements with economic substance, bilateral investment treaties (BITs), the North American Free Trade Agreement (NAFTA) and contracts governed by the Vienna Convention on the International Sale of Goods (Burnett, 2008, p. 180).

Arbitration is likely to fix some of the inadequacies of the MAP but not all. Even though it has many inadequacies, the MAP remains the most popular international tax dispute resolution mechanism. Has the introduction of arbitration sufficiently addressed the majority of the issues creating conflicts in the business world? What are the procedural steps suggested in entering into a MAP? Can anything be done to further address some of the inadequacies contained within the MAP, and are there other dispute resolution methods that would provide more successful international tax dispute resolution?

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1.2 RESEARCH PROBLEM

The increased complexity and volume of international trade undoubtedly results in tax implications that are not sufficiently addressed in tax treaties or conventions. Differences in the interpretation of the underlying facts of those trade transactions may lead to a host of international tax disputes, often resulting in juridical double taxation. The only remedy currently available for the taxpayer is the MAP, which as stated have various inadequacies.

As previously stated, both the OECD MTC and the UN MTC tried to address some of the inadequacies of the MAP through the introduction of mandatory arbitration, but was this enough to ensure effective resolution? This leads us to the research problem. Does the MAP, as its currently suggested, provide all parties with most effective international dispute resolution mechanism or could further developments or other methods provide for a more acceptable result?

1.3 OBJECTIVE

The first objective of this study is to understand the evolution of dispute resolution. It is important to understand the context and historic development of dispute resolution mechanisms and how the concerns and suggestions of academics, state-sponsored enterprises, professional organisations and practitioners assisted the mitigation of double taxation. This will be achieved by an analysis of the history behind dispute resolution from the first suggested negotiation based resolutions in 1899 up to the recent addition of paragraph 5 to Article 25 of the OECD MTC suggesting a process of arbitration.

The second objective of this study is to understand the MAP as a mechanism of dispute resolution. This will be achieved through the examination of the commentary to Article 25 of both the OECD MTC and the UN MTC and published reports and suggestions by both institutions.

The third objective of this study is to determine if the MAP can be adapted further to address some of its inadequacies without sacrificing any of its benefits. This will be achieved by analysing both the advantages and disadvantages of the MAP as an international tax dispute resolution method. The institutional design developed by Dr Zvi Altman will also be considered as a potential alternative or a form of enhancement to the current MAP. Dr Altman is an international tax specialist focussing on both US domestic and international tax and his study on dispute resolution under tax treaties was awarded the International Fiscal Association (IFA) Mitchell B. Carroll Award for best dissertation in the field of tax for 2006 and identifying viable solutions suggested in available literature.

The overall objective will be to evaluate the MAP as an international tax dispute resolution mechanism and to determine if it requires further amendment in order to provide all parties with a more acceptable result.

1.4 INTRODUCTION TO THE HISTORY OF MTCs AND DISPUTE RESOLUTION

Globalisation as a phenomenon is not new and since the League of Nations recognised that the differences in domestic tax systems negatively effects the continuous growth as a result of double taxation (OECD, 2013b, p. 7), many developments have been made to achieve elements of conformity. These developments accelerated somewhat after the stabilisation of economies directly fed off the interdependence between jurisdictions in a post-war era. Increased cross

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border trade activities lead to an increase in double taxations with both businesses and governments requiring assistance in the avoidance thereof of double taxation (Owens & Bennett, 2008, p. 10), and even though earlier efforts by the League of Nations, i.e. the so-called London (1946) and Mexico (1943) models, provided some indication principles that could be applied to the taxation of international trade, they did not provide the conformity to adequately facilitate the allocation of taxing rights.

There was a desperate need to the harmonization and uniformity of the principles, definitions, methods and interpretation governments based the allocation of taxing rights upon (OECD, 2010, p. 7). Governments wanted to claim their rightful tax from the businesses expanding over its national borders while avoiding the unjust taxation of the growing number of international businesses (Owens & Bennett, 2008).

In 1956 the Organisation for European Economic Co-operation (hereafter "OEEC") set up its Fiscal Committee who through the years published their proposals for a series of model articles which were accompanied by commentaries (International Tax Institute, 2008). The Fiscal Committee continued their work through the reconstitution of the OEEC into what is today known as the Organisation for Economic Co-operation and Development (hereafter "OECD") in 1960-61. Even though a full draft of the combined model articles was available in July 1963, it wasn't until 1977 that a full draft of what is today known as the Model Tax Convention on Income and Development (hereafter "OECD MTC") was published (OECD, 2010, p. 8).

This model is used as a basis for the negotiation of tax treaties that intend to prevent international double taxation through the distribution of taxing rights between the taxpayer's country of residence and the country in which the income had its source (Vega & Rudyk, 2011, p. 3). Since the initial publication the OECD MTC underwent constant review and forms the skeleton of more than 3000 bilateral tax treaties around the world with updates being published as the economics of international trade develops. The OECD MTC's first update was during 1992 and since then updates were published in 1994, 1995, 1997, 2000, 2003, 2005, 2008 and 2010 (OECD, 2013a).

Through the use of tax treaties, countries aim to maintain economic growth and collectively agree that there is a need to avoid double taxation through the use of international rules or guidance. MTC has become the basis for international tax law, which in itself is the key pillar supporting the growth of the global economy (OECD, 2013b). The OECD MTC was essentially developed to provide standardised guidelines for the resolution of tax matters between two

OECD member states. Many regard the OECD member states as a group of wealthy or industrialised nations where mutual benefit through international trade is guaranteed. Initially only 15 OECD member states were involved in drafting the model articles. That number increased to 20 states by the time the first draft was published (Owens & Bennett, 2008, p. 10). As only OECD member states enjoyed initial input into the contributions and developments of the OECD MTC, it also favours the principle of residency to determine the right to tax. (Owens & Bennett, 2008, p. 10).

This was not a basis view shared by all states and with the acceleration of globalisation many industrialised states aimed their actions at the promotion of the flow of foreign investment to developing countries. There was a growing need to conclude bilateral tax treaties between developed and developing countries, a need first recognized by the Economic and Social Council (ECOSOC) of the United Nations who identified this in its resolution 1273 (XLIII) adopted on 4 August 1967 (United Nations, 2011).

In 1968, the Secretary-General of the United Nations set up an Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries. The Group was composed of tax officials and experts from both developing and developed countries, appointed in their personal capacity. The Ad Hoc Group of Experts' deliberations lead to the United Nations Model Double Taxation Convention between Developed and Developing Countries (hereafter "UN MTC") being published in 1980 (United Nations, 2011).

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These Models, i.e. UN MTC and OECD MTC, have profound influence on international treaty practice, and have significant common provisions. The similarities between these models indicate the need for conformity in allocating taxing rights. There are, however, some key differences in approaching these taxing rights especially regarding the sacrifice of some taxing rights in the view to avoid double taxation and the facilitation and support of foreign investment flows (United Nations, 2011).

The UN MTC embodies a compromise between the principles of source and residence, even though it provides more weight to the source than the MTC developed by the OECD. The retention of investment growth at source has long been a focus point of developing countries whereas the conclusion reached by developed countries tends to retain investment growth in the country of the investor (United Nations, 2011).

The OECD MTC is based on the theory of mutual benefit in the commercial relationship between contracting states but when contracting states are at different stages in their development, mutual benefit is not always achieved (Mutén, 1990, p. 3). The tax base of developing countries relies on foreign investment through foreign ownership and the procurement of foreign developed intellectual property. Substantial interest and royalty payments as compensation for the foreign investments have to be made to foreign recipients, thereby depleting the tax base of developing countries (Mutén, 1990, p. 3).

Since 1997, the OECD allowed non-member countries to provide input into the evolution of the MTC through expressing their disagreement and or position on the articles and commentaries (Vega & Rudyk, 2011, p. 3). The OECD develops tax policies and best practises without considering the development agenda of some countries, but what they don't necessarily realise is that for the developing countries of the world, the two are inseparable. Developed countries would make a serious misjudgement if either one of these two issues (tax policy and development agenda) are considered on a stand-alone basis.

In the analysis performed by Vega and Rudyk (2011: 3) it was concluded that there is a direct correlation between the number of reservations submitted by OECD member counties and those submitted by non-member countries, yet despite having worldwide influence, the OECD Model serves better the interests of developed States. Many developing countries perceive the OECD as a cartel of rich countries operating at their expense (Avi-Yonah, 2001, p. 11). A developing country's share of the tax base is strongly affected by other fundamental taxation principles, principles that are not even remotely considered for discussion by the OECD, an example of which is the formulary apportionment proposal (Horner, 2001, p. 6).

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The main purpose of any MTC is the avoidance of double taxation, a purpose achieved through the standardization, clarification and confirmation of various fiscal situations where taxpayers engage in income-generating activities in countries where they are not resident. Through the use of the MTC, contracting states can objectively negotiate international tax treaties under which the taxing rights are either allocated to the country of source or the country of residence. This negotiation should result in the development or revision of comprehensive bilateral agreements.

The MTC starts by setting out the scope of the convention, stating both the persons and taxes that would be covered under it. The convention continues by setting out the definitions that would be required in the interpretation of negotiated treaty followed by allocation of taxing

rights based on the different classes of income (Article 6 to 21) and capital (Article 22) (OECD, 2010). The convention forms a set of arbitrary rules that support a specific compromise through providing the exclusive right to tax the income in question to one of the contracting states, thereby preventing the other contracting state to tax the same amount and thereby avoid double taxation. When disputes occur and that compromise is not reached, the convention provides a method of resolution in Article 25.

As can be seen from the above, the evolution of avoiding juridical double taxation has come a far way. The free movement of capital and labour, the shift of manufacturing bases from high-cost to low-cost locations, the gradual removal of trade barriers, technological and telecommunication developments, and the ever-increasing importance of managing risks and of developing, protecting and exploiting intellectual property, have had an important impact on the way cross-border activities take place (OECD, 2013b). These have all become more advanced in both volume and intricacy.

Multi-national enterprises are ever growing with some contributing massively to both domestic and global GDP. There's a continued focus to expand in country operating models to globally integrated operations (OECD, 2013a), contributing to a range of complex transactions. Throughout this ever expansion of complex operations tax administrators remained focused to preserve and increase their tax base, while maintaining the foreign investment enjoyed. Domestic legislation changes accordingly but the sovereign states do not necessarily take into account the effect legislative changes might have on other countries' rules. It is therefore not surprising that there has been a continued focus of dispute resolution (Altman, 2005). As mentioned, this focus has resulted in the inclusion of mandatory arbitration.

1.5 RESEARCH METHODOLOGY

This study will aim to reach its objectives by applying a qualitative research approach with an interpretive focus, meaning the research aims to understand the MAP as a dispute resolution method and determine its ability to reach the relief from double taxation. This will be done through a literature review and a naturalistic analysis of the interpretations and observations made by organisations and academics operating in the field of international tax.

Qualitative research can be defined as a situated activity that locates the observer in the world. It consists of a set of interpretive, material practices that makes the world visible. These

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practices transform the world. They turn the world into a series of representations, including field notes, interviews, conversations, photographs, recordings, and memos to the self. At this level, qualitative research involves an interpretive, naturalistic approach to the world. This means that qualitative researchers study things in their natural settings, attempting to make sense of, or to interpret, phenomena in terms of the meanings people bring to them (Denzin & Yvonna, 2005, p. 3).

In conducting the qualitative research an interpretive perspective will be maintained as the objective of the study is to reveal the multiple realities of dispute resolution i.e. the perspectives of both the taxpayer and the tax administration. In many ways the objective reality of dispute resolution cannot be captured, however the data can be interpreted in most neutral way possible. The interpretive paradigm regards the researcher's values are inherent in all phases of the study while maintaining that the reality cannot be separated from the knowledge. Truth is negotiated through dialogue (Robert Wood Johnson Foundation, 2013).

In identifying the data to be analysed, a detailed search of the existing literature will be undertaken. The documentation identified will be analysed and an extended literature review of a descriptive nature will be performed to reach the documented research objectives. The documentary data that will be used will consist of:

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- OECD MTC and Commentary;
- UN MTC and Commentary;
- Relevant articles and publications by governing bodies such as the International Chamber of Commerce and academic authors in the field of taxation or dispute resolution who concluded on their views making use of reputable sources.
- The doctoral study performed by Dr Zvi Altman published in 2005 as Dispute Resolution under Tax Treaties.

1.6 VALIDITY AND RELIABILITY

The use of validity and reliability in association with qualitative research conceptualizes the trustworthiness, rigor and quality of study in question (Golafshani, 2003, p. 604). In order to achieve this, the researcher's perspectives and interpretation of data should be free from bias in order to honestly convey the truth (Golafshani, 2003, p. 604). This study will be conducted

free from prejudice or bias in order to determine the objectives set out and conclude on the effectiveness of MAP as a dispute resolution method.

1.7 ETHICAL CONSIDERATIONS

Ethical considerations forms the heart of interpretive qualitative research as the interpretations reached should avoid bias, generalisation and plagiarism. In an attempt to avoid any of these affecting the conclusions reached in this research study, all work will be cited to the applicable author. The interpretations and conclusions reached by other authors will be portrayed in the words of the researcher with the appropriate referencing indicating the source of the originating view.

1.8 LIMITATIONS AND DELINEATION

The study focuses on the resolution of international tax disputes between two contracting states where non resolution will lead to juridical double taxation. Therefore the study excludes paragraph 3 to Article 25 of both the OECD Model Tax Convention and UN Model Tax Convention. This study focuses on taxpayers who are companies and therefore excludes disputes applicable to individuals or trusts. A further exclusion is a detailed discussion regarding the domestic remedies available to a taxpayer as the domestic remedies will vary from jurisdiction to jurisdiction.

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1.9 CHAPTER LAYOUT

Chapter 1 to this study discussed the basis of taxation with the ultimate focus on the possible differences in the approach to taxation of different states. It provides background on juridical double taxation and introduces the research problem and the objectives of this study. It continues to provide further background on the platform on which dispute resolution is based and provides clarity on the research methodology that will be used to reach the objectives of this study. It concludes by providing the ethical considerations, limitations and framework of the study followed by a brief summary.

Chapter 2 aims to provide context to the history of dispute resolution. It is important to understand the context and historic development of dispute resolution and the methods employed. It is also important to understand how the concerns of academics, state sponsored

enterprises, practitioners and other professional bodies assisted in the development of the MAP portrait in the conventions available today.

Chapter 3 aims to underline the purpose and procedural flow of the MAP as described in the two most common conventions available i.e. the OECD MTC and the UN MTC. Both these conventions' Article 25 will be compared with the commentary to the conventions providing context to the application. Publications such as the Manual on Effective Mutual Agreement Procedures (hereafter "MEMAP") by these organisations will also be used as supplementary in the understanding of the purpose and flow of the dispute resolution mechanism.

Chapter 4 aim to highlight the advantages and disadvantages of the MAP as a dispute resolution mechanism by highlight the perspectives of both the taxpayer and the tax administration. This chapter will also look at possible resolutions of the disadvantages without diminishing the advantages the MAP provides, by looking at other forms of dispute resolution available in the international context.

Chapter 5 will conclude on all the research findings presented throughout the study.

1.10 SUMMARY

This chapter introduces the reader to the background and foundation of the research problem and the research methodology that will be used in answering the research question. The chapter also highlights the possibility of dispute resolution and the basis on which the resolution thereof is founded. The literature review performed provides insight as the inadequacies of the MAP and the efforts made to address those inadequacies. A further analysis will be required on how to initiate the MAP and to what extent it requires further development in order to become an all-round acceptable dispute resolution mechanism.

CHAPTER 2 – HISTORY OF INTERNATIONAL TAX DISPUTE RESOLUTION

2.1 INTRODUCTION

International tax treaties are unique bilateral negotiations that aim to effectively break down the barriers of international trade while aiming to eliminate double taxation and prevent fiscal evasion (OECD, 2010, p. 7). As stated in Chapter 1, there is no third party enforcer ensuring adherence to the bilateral negotiations which could result in disputes arising as a result of interpretation or differences in application. These disputes are always identified because they have a natural third party, i.e. the taxpayer (Rixen, 2008, p. 25).

In Chapter 1 it was stated that the majority of international tax treaties are negotiated based on a model conventions developed by either the OECD or the UN. Both the OECD MTC and the UN MTC contain a framework remedy to resolve international tax disputes in Article 25 of their respective conventions i.e. MAP. MAP was developed in the early 20th century and is a non-binding, non-compulsory settlement procedure that has not undergone any significant change other than the introduction of arbitration (Altman, 2005, p. 1).

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Tillinghast (2003, p.371) reasons that there are two explanations for the under development of the dispute resolution mechanisms, the first of which is that the current process is working and therefore development was not needed. The second and most probably the main contributing factor is the sovereignty principle. The sovereignty argument is simply that taxes are a country's ultimate expression of national sovereignty and that decisions involving them should not be delegated to international or private bodies, a concept very much like the "revenue rule" which states that a country will not enforce the tax laws of another country (Tillinghast, 2003, p. 371).

The "no need" argument states that the Competent Authority process currently found in most modern tax treaties, works. The fact that there are times where cases are unresolved does not provide sufficient justification to construction of another legal remedy or procedure resulting in the further complication of bilateral treaties (Tillinghast, 2003, p. 371).

There are many inadequacies arising out of MAP. There's no clear procedural rules, no time limits but most importantly, no guarantee that it will result in the elimination of double taxation. It is understandable that the inadequacies of MAP has enticed criticism from both academics

and the business community and in response to some of these criticisms the OECD launched a project dedicated to the resolution of cross-border tax disputes in 2003 (Gildemeister, 2007, p. 3). The OECD conceded that even though the MAP incorporated in the majority of bilateral treaties generally worked, it was being put under increased strain due to complexity and volume of the international tax disputes that arise (OECD, 2004, p. 2).

It is important to understand the context and historic development of international tax dispute resolution to determine the dynamic that resulted to changes made to the methods employed. Chapter 2 to this study aims to provide the historic context to international tax disputes by stating the concerns raised by academics and state sponsored enterprises, practitioners and other professional bodies. The concerns formed the basis of the MAP as it is currently suggested in the two most popular conventions.

2.2 HISTORY OF TAX DISPUTE RESOLUTION

2.2.1 Inception

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The first study on dispute resolution goes as far back as 1895, wherein Ludwig von Bar recommended the use of an international tax court (Altman, 2005, p. 75) with the first formal use of a dispute resolution mechanism used in a tax treaty dated 1899. The treaty of 21 June 1899 concluded between Austria-Hungary and Prussia for the "Avoidance of Double Taxation which can Result From the Applications of the Tax Laws in Force in the Kingdom and Lands Presented in the Imperial Council and in the Kingdom of Prussia" is the earliest income tax treaty recoded by the League of Nations. This treaty included a dispute resolution process that was based on a non-binding negotiation based resolution between the two contracting states and limited to specific issues (Altman, 2005, p. 13). The unofficial translation of Art 7 of the 1899 treaty reads as follows:

> *"Concerning the potentially required special provisions for the appropriate elimination of double taxation of such persons who are Austrian as well as Prussian nationals and, at the same time, have their residence in both territories, the Contracting Parties, if such a case happens, will enter into an understanding and will take appropriate measures in accordance with this understanding."* (Bertolini, 2010, p. 5)

This article seems to only settle disputes arising out of residence. Due to the simplistic nature of trade and investment, residence related disputes were the most common reason for disputes that arose. Another example of the early attempts at dispute resolution is Art 8 of 18 May 1901 tax treaty between Austria and the principality of Liechtenstein (Altman, 2005, p. 14). The process read as follows:

> *"The financial administrations of the Contracting Parties shall, when necessary, come to an agreement and adopt measures in accordance with the agreement in regard to any special provisions which may be required to prevent, as far as is practicable, double taxation in the case of persons who are nationals of both countries and who are domiciled at one at the same time in both territories."* (Altman, 2005, p. 14)

The early stages of dispute settlement did not seem to specifically allocate the taxing right to either of the contracting states. These two articles indicate a negotiation based process through which the contracting states could practically prevent double taxations resulting from resident-resident conflicts. Even though it was the taxpayer's residence that resulted in the dispute, the taxpayer did not have any decisive input in the process.

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2.2.2 Introduction of Taxpayer involvement

Many countries demonstrated preference to the conclusion of bilateral tax treaties between the First and Second World Wars (Chetcuti, 2001, p. 1) with more than 88 treaties preventing double taxation being concluded in that time (Altman, 2005, p. 14). The majority of these treaties followed a traditional negotiation based approach including the multilateral Treaty of Rome signed 6 April 1922 between Austria, Hungary, Italy, Poland, Romania and Yugoslavia (Altman, 2005, p. 14). This treaty arguably failed but was later ratified as a bilateral treaty between Austria and Italy (Altman, 2005, p. 15).

Dr Altman, in his book *"Dispute Resolution under Tax Treaties"* states that this is the first allowing for taxpayer involvement in that it provided the taxpayer with an opportunity to request the two governments to consult in an attempt to seek, through diplomatic means, the avoidance of double taxation. Other treaties at the time did not provide the taxpayer with this right (Altman, 2005, p. 15). The applicable article in this treaty read:

"If it is provided that the action of the financial authorities of the different States has resulting in the levying of double taxation on the taxpayer, the latter may appeal to the State to which he belongs. If his appeal is allowed, the State in question may, in the interest of the taxpayer, demand through diplomatic channels that the financial authorities of the States which have levied the taxation in question shall agree on some equitable arrangement for avoiding the double taxation." (Altman, 2005, p. 15)

The term "shall agree on some equitable arrangement" does not provide clarity whether or not such arrangement would be compulsory or binding and (as cited by Altman, 2005 p. 15) stated that no proof was obtained that this was the case. However, the direct translation does entice the idea of compulsory dispute resolution.

2.2.3 Compulsory Resolution

Although the need for guiding rules on international double tax disputes were not yet established, the League of Nations' Committee on Technical Experts suggested in their 1923 and 1925 reports the configuration of a technical committee to decide on international double tax disputes (Chetcuti, 2001, p. 1). Importantly, this technical committee would only have advisory powers when assisting governments on disputes. This assistance would also only be provided if the governments requested it (Altman, 2005, p. 41). The 1925 report even suggested the configuration of an international body to exclusively have this duty. This approach was adopted in the income tax treaty signed 14 April 1926 between the United Kingdom and Ireland in which Article 7 provided for the delivery of a binding judgement by a tribunal. Article 7 read:

"Any question that may arise between the parties to this Agreement as to the interpretation of this Agreement or as to any matter arising out of or incidental to the Agreement shall be determined by such tribunal as may be agreed between them and the determination of such tribunal shall, as between then, be final." (Chetcuti, 2001, p. 1)

The words "...determined by such tribunal..." could very well be the first mention of any arbitration like process. The wording of the article as a whole could even be considered as the first mention of any form of international dispute resolution authority. Another important factor

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of this article is that it is not only limited to residency issues as previously identified in dispute resolution articles.

The article also highlights the finality of the tribunal's decision leading one to the understanding that the decision could in fact be binding. This indicates that in some way or form some jurisdictions could be more susceptible to the idea of an international authority, especially if the jurisdictions have input to the selection of the tribunal panel. However, the article does not indicate what should happen if no agreement was made regarding the selection of the tribunal.

The questions arising out of the selection of the tribunal can possibly be answered by another treaty, which was not a treaty for the avoidance of double taxation out of income taxes, but rather succession duties (Altman, 2005, p. 17). A section sited out of Art 6 of the *Convention between the Kingdom of Romania and the Czechoslovak Republic concerning Double Taxation in connection with Succession Duties* signed 20 June 1934 read as follows:

> *"…the dispute shall be submitted to whatever technical organisation the Fiscal Committee of the League of Nations may determine. The said technical organisation shall make its award after hearing the Parties and bring them together as may be required. The award shall be binding on both contracting States without right of appeal."* (Altman, 2005, p. 17)

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Other succession duty treaties of the time did not provide for a similar article and did not instigate compulsory, binding rulings by an international recognised organisation (Altman, 2005, p. 18).

The Committee on Technical Experts reconvened in 1927 and in continuance of the discussions that lead to the reports of 1923 and 1925, they envisage the creation of a model for multilateral treaties but continued with the bilateral approach as it considered the differences in sovereign tax laws. In consideration of the dispute resolution the 1927 report is similar to the 1925 report but provided more clarity on the process (Altman, 2005, p. 44). In 1927 draft income tax treaty, Article 14 was dedicated to dispute resolution and read as follows:

> *"Should a dispute arise between the Contracting States as to the interpretation or application of the provisions of the present convention, and should such dispute not be settled either directly between the States or by the employment of any other means of reaching agreement, the dispute may be submitted, with a view to an*

amicable settlement, to such technical body as the Council of the League of Nations may appoint for this purpose. This body will give an advisory opinion after hearing the parties and arranging a meeting between them if necessary. The Contracting States may agree, prior to the opening of such procedure, to regard the advisory opinion given by the said body is final. In the absence of such an agreement, the opinion shall not be binding upon the Contracting States unless it is accepted by both, and they shall be free, after report to such procedure or in lieu thereof, to have recourse to any arbitral or judicial procedure which they may select, including preference to the Permanent Court of International Justice as regards any matters which are within the competence of that Court under its Statute. Neither the opening of the procedure before the body preferred to above nor the opinion which it delivers shall in any case involve the suspension of the measures complaining of; the same rule shall apply in the event of proceedings being taken before the Permanent Court of International Justice, unless the Court decides otherwise under Article 41 of its Statute." (Altman, 2005, p. 44)

This article seems to seek a midway between binding and non-binding resolution as it provides governments with the option of both. There seemed to have been no initial objection to this article (Altman, 2005, p. 45) until the General Meeting of Government Experts in 1928. It was at this meeting where Mr Liumbimov, a delegate from the USSR, indicated that his government was not party to the League of Nations and as such any reference to its technical body should be deleted (Altman, 2005, p. 25). In 1929 the League of Nations established the Fiscal Committee with its sole purpose being the study of double income taxation. Following the Fiscals Committee's annual meeting in 1931, two double tax conventions were published, both of which contained what Altman (2005, p. 25) regards as "the most comprehensive and far-reaching dispute resolution procedures drafter for income tax treaties in the first half of the 20th century".

This comprehensive approach was contained in Article 17 – 21 contained three predominant steps (Altman, 2005, p. 48). The Contracting States were first obliged to resolve the dispute by direct negotiation where after they could, if agreed, submit the dispute for adjudication by a technical body appointed by the League of Nations. The technical body had to provide, within an agreed timeframe, a resolution which could be binding if the Contracting states made that decision upon initiation. If the parties chose not to accept the technical body's opinion, the

dispute had to be submitted to the Permanent Court of International Justice (hereafter "PCIJ") or an arbitral tribunal. This decision would be binding (Altman, 2005, p. 49). The comprehensive approach of 1931 did not last long and it was subsequently replaced in the 1933 report which coincidently seemed to revert to the text used in Article 14 of the 1927 report. It is argued by Altman (2005, p. 50) that the League of Nations developed distrust in the PCIJ as it was perceived as "slow, contentious and ill-qualified to deal with international economic disputes".

During the Second World War the Fiscal Committee to the League of Nations, struggled to continue with its annual meeting but managed two meetings in Mexico (June 1940 and June 1943) (Altman, 2005, p. 54). These meetings gave rise to the 1943 model bilateral tax treaty for the prevention of double taxation which was subsequently revised by the 10th sitting of the Fiscal Committee in London on 20-26 March 1946 (Altman, 2005, p. 55). These two treaties included a dispute resolution very similar to the one contained in the 1922 Treaty of Rome and was also the adoption of the MAP. As previously stated, the MAP is a non-binding, non-compulsory dispute resolution mechanism and even though only two treaties included a binding form of resolution, one could argue that a method excluding influence by international institutions was only possible outcome in a time where there was a significant distrust in the League of Nations ability to manage global decisions (Altman, 2005, p. 57).

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2.2.4 Modern MTCs and MAP

Further enhancements to the MAP after its introduction in the 1943 and 1946 model tax conventions were primarily conducted by either the OECD or the UN.

2.2.4.1 UN

In 1949, the Netherlands submitted a suggestion to the Fiscal Committee of the UN Economic Social Council suggesting a fiscal chamber entrusted with the task of dispute resolution, being set-up operating within the International Court of Justice or the International Court (Altman, 2005, p. 57). The Fiscal Committee's response aligned with the choice to adopt the MAP in conventions available as it indicated that the control of the resolution process should remain with the parties involved and added that the taxpayer should not have direct access to these courts.

In 1968, the Secretary-General of the United Nations set up an Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries. The Group was composed of tax officials and experts from both developing and developed countries (United Nations, 2011). Many discussions took place within this timeframe with the Ad Hoc Group of Experts presenting reports in 1969, 1970, 1972 and 1976 (Altman, 2005, pp. 67-74). These deliberations lead to the UN MTC being published in 1980 (United Nations, 2011).

The concept of dispute resolution was contemplated in each of these reports but it was clear that the group did not wish to drift from the MAP already suggested and ultimately published in the 1977 OECD MTC. Altman (2005, p. 68) suggests, and I agree, that the UN's initial decision not to pursue any form of compulsory or binding resolution is surprising. He states that binding or compulsory resolution better serves the developing economies in an attempt to "balance the different negotiating powers" and continues that the MAP provides "preference to the rights of the economically stronger negotiating party". The most probable reason for not giving more focus on binding or compulsory dispute resolution is the unavoidable issue of tax sovereignty, which has proven to be the biggest are of concern surrounding a binding approach (Farah, 2008, p. 6).

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In a 1970 study performed by the Secretary-General of the UN it was stated the establishment of a judicial or quasi-judicial body was not feasible at the time (Altman, 2005, p. 69). He was of the opinion that:

> *"It must be recognised that notwithstanding the significant growth of international business, the greatly increased number of bilateral treaties, and the major contributions to international tax law made by international organizations, the institution of judicial or quasi-judicial procedures for the decision of fiscal disputes is not closer to realization than it was almost twenty years ago"*

His study did however indicate that a more limited role by an advisory panel of tax experts would provide both a method to obtain clarification and possibly add to a unified system through which treaties could be interpreted (Altman, 2005, p. 69). These advantages were further investigated in 1972's report by the Group of Ad Hoc Experts and in 1976 the idea of establishing a formal panel of experts was abandoned. The 1976 report instead focused on transfer pricing and the creation of a list of experts that could assist developing economies as the "simple resort to outside assistance of the kind (like the envisaged panel of experts… could

be of use in certain situations” (Altman, 2005, p. 71). There was no mention of any panel of experts in the first draft publication of the UN MTC in 1980.

Changes in the international economic environment coupled with instances of governmental recourse to arbitration and the conclusion of a tax treaty containing an arbitration provision (Germany Sweden / USA, further discussion in 2.2.5) resulted in the issue of international tax dispute resolution being discussed when the Ad Hoc Group of Experts met for a fourth meeting in 1988 (Altman, 2005, p. 71). The investigations of the 1970s were re-examined with similar conclusions. However, this meeting did recognise the imperfections of the MAP and presented the possibility of obtaining an advisory opinion from an acceptable source which could possibly facilitate the conclusion of the MAP (Altman, 2005, p. 72).

This recognition of the MAPs imperfections was again highlighted as focus points in the 1999 and 2001 meetings held (Altman, 2005, p. 74), as developing economies “have become involved in lengthy and costly disputes with multinational companies over the proper application of the arm’s length principle”. Even though this group investigated the use of both arbitration and mediation, it did not form part of its recommendations. Another meeting was held in 2003 at which the use of arbitration and mediation was discussed but only in the context of transfer pricing (ECOSOC, 2003, p. 14). Further changes were only made after the proceedings of the dedicated project, launched by the OECD for the improvement in the process of resolving international tax disputes (ECOSOC, 2005, p. 6).

2.2.4.2 OECD

Even though there were important changes in the formulation of the MAP, it remained basically unchanged until the publication of the 2008 OECD MTC (Altman, 2005, p. 58). Dr Altman’s studies indicate that even though there was no mention of any dispute resolution with the use of international institutions in its publications, the OECD did not abandon its efforts to establish an appropriate body to provide expert opinion. The OECD even offered to provide such services (Altman, 2005, p. 59) and in commentary to the 1961 report it stated:

> *“As the provisions embodied in this Convention as well as the Commentaries annexed thereto are the result of a close international join work within the Fiscal Committee, a possibility near at hand would be to call upon the Fiscal Committee to give an opinion on the correct understanding of the provisions where special*

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difficulties of interpretation arise as to particular points. Such a practice, which would be in line with the mandate and aims of the Fiscal Committee with regard to the progressive elaboration of uniform law for the avoidance of double taxation, might well make a valuable contribution to arriving at a desirable uniformity in the application of the provision."

In 1977, the OECD published its first draft of the MTC and in the commentary to Article 25 included that the Committee on Fiscal Affairs could provide an opinion on "the correct understanding of the provisions where special difficulties of the interpretation arise" it continues stating that "It might also be feasible to ask the opinion of certain persons acting as independent arbitrators" (Altman, 2005, p. 60).

The OECDs Committee on Fiscal Affairs extensively reviewed the possible use of arbitration provisions in its report released in 1984 but concluded that it "does not, for the time being, recommend the adoption of compulsory arbitration" and is of the view that it would "represent an unacceptable surrender of fiscal sovereignty" (Farah, 2008, p. 7). This conclusion was not reached without adequate consideration of the inadequacies presented by MAP. The report also indicated that it is a "less than perfect instrument" providing only a duty to negotiate, not resolve, a conclusion that is non-binding, conflicting with various domestic laws, time consuming and uncertain (Altman, 2005, p. 62). The lack of taxpayer involvement and the conclusion of "package deals" lead to the unfair result for one taxpayer in favour of a fair result of another (Altman, 2005, p. 62).

It was not until 1995 that the OECD reopened the investigation into a more structured approach to resolve international disputes as "it seems appropriate to analyse again and in more detail whether the introduction of a tax arbitration process would be an appropriate addition to international tax relations" (Altman, 2005, p. 65). The OECD stated many reasons for the reopening of this investigation with the most important being the enforcement of the European Arbitration Convention on 1 January 1995 (Altman, 2005, p. 65). The investigation only came into full affect in 2004 after the OECD consulted various businesses which indicated that there were a number of real concerns which had to be addressed (OECD, 2004, p. 2).

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2.2.5 Other Developments with regards to Arbitration

There is no universally accepted definition of arbitration however there are some core characteristics found in all definitions (Tweeddale & Tweeddale, 2005, p. 33). The characteristics summarised by Tweeddale & Tweeddale (2005, p.33) identifies the need for an arbitration agreement, a dispute on which agreement is required, a third party decision maker and the decision made by that third party. These characteristics are similar to the ones identified through the use of MAP as it also requires an agreement i.e. a negotiated treaty and a justified dispute without unilateral solution (OECD, 2010, p. 37), but it does not require the use of a third party.

As stated previously, the use of a third party was initially suggested by Ludwig von Bar in 1895 (Altman, 2005, p. 75) and since then many shared that sentiment. Dr Altman (2005, p. 75) mentions a proposal by a Dutch scholar in 1923 proposing the use of an international tax organization which was ultimately followed by the next suggested use of third party intervention by the League of Nations' in 1925 which lead to the conclusion of the treaty between the UK and Ireland which mentioned the use of a tribunal.

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The use of third parties in the realm of international tax dispute resolution have long been contemplated by many, including the International Fiscal Association (IFA) who discussed the matter at their fifth congress in Zurich 1951 (IFA, 1993, p. 3). The representatives at the congress felt that there was a requirement for "the creation, under the auspices of the most qualified international groups, of a permanent juridical committee" which would bring under the attention of the UN the need for "an obligatory arbitration clause permitting the contracting states to have determined by an arbitrator the meaning of the clause under dispute" (IFA, 1993, p. 3). Nothing came of this and the subsequent meetings in 1957 and 1960 respectively questioned the use of an international tax court (IFA, 1993, p. 3).

Another commission established in 1962, i.e. the Canadian Royal Commission of Taxation, tasked with improving Canadian tax law submitted a report to the then Government General in Council (Altman, 2005, p. 86) of which one recommendation read:

> *"If possible, tax treaties should provide for a tribunal consisting of representation of each country and a third party member chosen by them to resolve disputes and problems of double taxation"* (Altman, 2005, p. 87)

The concept of international tax arbitration was once again suggested at the 1973 IFA congress by the German Country report, but only to the extent of disputes relating to permanent establishments (Altman, 2005, p. 84). Arbitration was again supported by the World Association of Lawyers at its congress in 1979 through the proposals of the Lindencrona-Mattsson study (IFA, 1993, p. 4). Lindencrona and Mattson's report suggested the compulsory arbitration through the use of an international institution of arbitration and concluded that jurisdictions already consented to the limitation of their taxing rights and should therefore not distance themselves from ensuring solutions be reaching in determining that right in cases of disputes in the interpretation of tax treaties (Chetcuti, 2001, pp. 5,6).

The IFA met again in 1981 where the concept of MAP was scrutinised and its inadequacies exposed by a number of national reporters (Altman, 2005, p. 84), some of which recommended formal arbitration procedures. Lindencrona and Mattsson also featured in the 1981 IFA Congress where they proposed the inclusion of the following model clause in all tax treaties (Chetcuti, 2001, p. 6):

> *"In one of the Contracting States is of the opinion that one of its residents has, due to a difference of opinion between the Contracting States as to the interpretation of application of this Convention, not been taxed in accordance to this Convention it shall, if a solution has not been found by other means, call for arbitration for settlement of its dispute. The arbitration procedure is initiated by a request for arbitration to the International Institute for Arbitration in Tax Disputes in Stockholm and shall follow the rules of that institute. The award shall be binding on the Contracting States"* (Chetcuti, 2001, p. 6)

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The shortcomings of the MAP was further scrutinised by The International Chamber of Commerce (ICC) in 1984 calling for both the improvement of MAP (Chetcuti, 2001, p. 9) and the introduction of arbitration provisions in international tax treaties (Altman, 2005, p. 88). The ICC has since been heavily focused on international tax dispute resolution (IFA, 1993, p. 4).

Even though the 1985 German – Swedish tax treaty included a voluntary arbitration clause (Chetcuti, 2001, p. 11) it was only on 29 August 1989 that the proposed use of arbitration as a method to resolve international tax treaty disputes, took a giant leap forward. It was on this date that the United States and Germany signed the diplomatic protocol enforcing the use of arbitration as a method of dispute resolution in the bilateral tax treaty concluded between the

two states (Altman, 2005, p. 19). The provision was short and subsequently enhanced by an exchange of letters detailing the arbitration procedure (IFA, 1993, p. 5).

Dr Altman's analysis of income tax treaties indicate that this ground breaking development lead to the inclusion of arbitration provisions in no less than 57 tax treaties in the 1990s most of which were concluded by the Netherlands, Canada and the United States (Altman, 2005, p. 21). His analysis continues to separate the arbitration provisions into five different groups; (1) Treaties requiring the exchange of preliminary notes before arbitration provisions became effective, (2) required consent by both contracting states before initiation of the arbitration provisions, (3) the initiation of the arbitration provisions by either contracting state, (4) arbitration initiation by a taxpayer and (5) the obligatory initiation of arbitration procedures after a certain time lapse of failed negotiation (Altman, 2005, pp. 21,22).

The last group of arbitration provision is also the second breakthrough development in the field of international tax dispute resolution i.e. the 1990 European Community Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (EC Convention) (Altman, 2005, p. 23). The convention concluded between twelve European countries (Altman, 2005, p. 23) provides a crucial model on the formulation of terms that would be appropriate for international tax arbitration (ICC, 2001, p. 3). The EC Convention was a multilateral agreement providing for compulsory arbitration and even though the result was not binding, it had to eliminate double taxation (ICC, 2001, p. 3). It applied to companies and permanent establishments and provided the taxpayer with the right to initiate a process of arbitration if the contracting states could not conclude a transfer pricing or permanent establishment related dispute under MAP after a period of two years (ICC, 2001, p. 3). The procedural rules of arbitration had to be established by the competent authorities with the ultimate decision implemented regardless of any domestic time limits (ICC, 2001, p. 4). The EC Convention came into effect on 1 January 1995 and also one of the reasons that resulted in the OECD reopening their investigation into arbitration as a possible enhancement to dispute resolution (Altman, 2005, p. 65).

In continuance of their long standing commitment in resolving tax disputes and in an attempt to accelerate the use of arbitration as a dispute resolution method, the ICC presented a position paper on the arbitration of tax matters in 2001 (ICC, 2001, p. 2). It strongly recommended that "states should adopt a system of compulsory and binding arbitration" (ICC, 2001, p. 5) and that it would present "significant advantages to business and governments" (ICC, 2001, p. 2).

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The ICC continued to this trend by publishing another policy statement in 2002 wherein it included a draft arbitration article and commentary but noted that further consideration would be required (Altman, 2005, p. 90). This further consideration came in the form of the OECD, who in 2003 initiated a project with the aim to "ensure a fully effective MAP process that has the confidence of taxpayers and therefore covers all aspects of the MAP from initial access to implementation of mutual agreement" (OECD, 2004, p. 2). To manage this project the OECD established a joint working group (JWG) consisting of Working Party 1 (focused on the interpretation of MTC) and Working Party 2 (focused on transfer pricing) (Altman, 2005, p. 65).

2.2.6 Improving the resolution of Tax Treaty Disputes

In 2004 the OECD released, for public comment, its first draft of the report on the work done by the JWG. This work was based on information the OECD obtained from its member countries, the private sector and non-OECD Economies (NOEs). The information obtained from the private sector seemed to indicate that the current mechanism available for dispute resolution i.e. MAP, was considered to be a "black hole" where disputes disappeared and when there were solutions, no explanation was provided to the taxpayer (OECD, 2004, p. 3). Based on the information the JWG highlighted two focal points that would lead to the improvement of the MAP i.e. improving the effectiveness of the MAP and an investigation into Supplementary Dispute Resolution (SDR) techniques (OECD, 2004, p. 3). The goal was not to reinvent MAP but rather to enhance the process by building on "the best features of the MAP" especially the achievement of cooperation between Contracting States (OECD, 2004, p. 4). These will be achieved through providing proposals for current implementation, future implementation and future studies (OECD, 2004, p. 4).

In improving the effectiveness of the MAP process the JWG proposed the development of a "Manual on Effective Mutual Agreement Procedure practices" (MEMAP) that would provide both tax administrators and taxpayers with a guide on best practices (OECD, 2004, p. 5). Through the MEMAP a number of the inadequacies of the MAP will be addressed including the enhancement of transparency, clarification on time limits, structural outline for the Competent Authorities function, increasing the taxpayer's role in MAP and clarification on the decision making process (OECD, 2004, pp. 4-28).

In the investigation into SDRs the JWG noted the commentaries suggestion of the advisory opinion (OECD, 2004, p. 28) from bodies such as the Committee on Fiscal Affairs and the possibility of forming a joint commission. It also suggested the possibility of a third party mediation (OECD, 2004, p. 29), through which the strengths and weakness of two Competent Authorities' positions would be evaluated to assist them in reaching a conclusion. The JWG also indicated that based on the already established EU Convention and proposals by the IFA and ICC that arbitration could also be used but only to the extent that it provides for a supplementary solution and not an alternative one (OECD, 2004, p. 29). It concluded that, on the matter of SDRs, the feasibility of "mandatory submission of unresolved MAP cases to a form of supplementary dispute resolution" had to be examined (OECD, 2004, p. 30).

In 2006, the OECD released the second public discussion draft in the improvement of the resolution of tax treaty disputes (OECD, 2006, p. 1). In this document the OECD provided notes on the follow-up work performed by the JWG on the improvement of the effectiveness of MAP and considerations for other dispute resolution mechanisms and included various draft changes to the OECD MTC as well as a proposal for a MEMAP (OECD, 2006, p. 1). The most important draft change to the OECD MTC was the proposed change to Article 25 which would now allow for arbitration as a supplementary process to MAP. After the consideration of all submitted comments and the proceedings of a public consultation meeting held in Tokyo, the OECD issued its final report in 2007 (OECD, 2007a, p. 3). This report included all the proposed changes to the articles and commentary that would be published in the 2008 updated OECD MTC (OECD, 2007a, p. 4). The new Article 25 would have an additional paragraph which read:

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"Where,

a) **Under paragraph 1, a person has presented a case to the Competent Authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and**
b) **The competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the Competent Authority of the other Contracting State,**

Any unresolved issues arising from the case shall be submitted to arbitration if the person so request."

(OECD, 2010, p. 36)

2.3 SUMMARY

This chapter provided the reader with a detailed history on the most significant developments in international tax dispute resolution, from the initial dispute resolution article of the 1899 treaty concluded between Austria-Hungary and Prussia to the ultimate revision of Article 25 to the OECD MTC. Throughout the history of international tax dispute resolution some common themes emerge. Competent Authorities won't be party to any process that diminishes their sovereignty. This is evident through the reluctance to fully initiate procedures where compulsory resolution is advised even though it's been suggested by the League of Nations through the use of a technical committee as early as 1925. The time taken to reach a conclusion of tax treaty disputes is also a common theme as it was first suggested through the distrust by the League of Nations' of the PCIJ due to slow resolution. This slow turnaround time was also one of the important factors leading to the revision of the OECD MTC which in turn also led to an updated UN MTC. This study will continue to analyse both Article 25 of the OECD and UN MTC, their respective commentaries and the procedural flow as suggested in the MEMAP in an attempt to identify whether or not the current MAP requires further amendment in order to provide all parties to tax treaty disputes with a more acceptable result. This analysis will continue in Chapter 3 where this study aims to understand the purpose and procedural flow of the MAP as portrait in the two predominate conventions i.e. the OECD MTC and the UN MTC.

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CHAPTER 3 – UNDERSTANDING MAP

3.1 INTRODUCTION

The purpose of this study is to determine whether or not the MAP as found in both the OECD MTC and UN MTC has developed in an adequate and effective means to resolve international tax treaty disputes for both the tax administrator and taxpayer. In determining the effectiveness of the MAP, the history of dispute resolution in Chapter 2 was analysed by focusing on the significant developments of the process in order to provide an indication of the changes that has been adopted and what effect it subsequently had. As indicated in Chapter 2, one of the most important developments in recent years was the findings presented by the OECD's JWG. In 2003 the OECD initiated a project with the aim of improving the resolution of tax treaty disputes and in 2007 the OECD released a report providing for changes to Article 25, the commentary to Article 25 and a manual on how to effectively use the MAP. Similar changes were made by the UN in their latest MTC.

In Chapter 3 this study aims to provide an understanding of an effective MAP. An analysis of the commentaries to both the OECD MTC and UN MTC will be performed in order to enhance the understanding of the process together with the differences between the conventions. To establish the procedural flow of an effective MAP, consideration will be given to the OECDs MEMAP. The OECD is of the opinion that the MEMAP provides a clear guide providing insight as to how a MAP should function (OECD, 2007b, p. 5). The MEMAP together with the commentary to both conventions will be used to gain the understanding of an effective MAP.

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3.2 COMMENTARY TO ARTICLE 25

The MAP is a non-binding, non-compulsory method to resolve international tax treaty disputes that result from the interpretation and application of a MTC (OECD, 2010, p. 354). MAP is a process that provides both taxpayers and tax administrators with a method through which taxation not in accordance with the conventions can be identified and duly rectified. The MAP is designed to provide more than just a method of settling disputes relating to taxation not in accordance with the convention (United Nations, 2011, p. 367), as it also provides for the elimination of double taxation not provided for in the convention.

3.2.1 Article 25 – preliminary remarks

As previously stated, MAP is contained in Article 25 of both the OECD MTC and UN MTC. The article only sets out the rules concerning MAP (OECD, 2010, p. 354), and if a further clarification is required reference should be made to the commentary to the conventions. The layout of the Article 25 contained in both the OECD MTC and the UN MTC is similar, with the main difference being the provision of two alternatives in the UN MTC (United Nations, 2011, p. 366). The one alternative includes arbitration in a paragraph 5 as with the OECD MTC, while the other allows for the exclusion thereof (United Nations, 2011, p. 366).

The commentaries to Paragraph 1 and 2, indicates that the "competent authorities shall endeavour by mutual agreement to resolve the situations of taxpayers subjected to taxation not in accordance with the provisions of the Convention" (OECD, 2010, p. 354). The commentary to Paragraph 3, which as stated in Chapter 1 is excluded from this study, provides clarification on the resolution double taxation resulting of interpretative or application ambiguities without an objection by the taxpayer (OECD, 2010, p. 354). Therefore Paragraph 3 also provides for the elimination of double taxation arising from situations not covered under the convention (OECD, 2010, p. 354). Paragraph 4 authorises the competent authorities to deal directly with one another (OECD, 2010, p. 354), while Paragraph 5 provides for arbitration.

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3.2.2 Article 25 – Paragraph 1 and 2

There is no difference between the actual wording contained in both paragraph 1 and 2 of the OECD MTC and the UN MTC. Paragraph 1 and 2 reads as follows:

> *(1): Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the Competent Authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.*

(2): The Competent Authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the Competent Authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States. (OECD, 2010, pp. 36,37) (United Nations, 2011, p. 30)

Even though the wording to Paragraph 1 remains the same in both conventions, the UN MTC does state that some of its members might adopt a different time limitation to the stated "presented within three years from first notification" (United Nations, 2011, p. 371). The OECD MTC does not limit its members as to the time limitation but more specifically states which of its members reserves the right for a different time limitation, as is the case with the United Kingdom and Turkey (OECD, 2010, pp. 379, 380).

When taxation not in accordance with the convention occurs, or will occur, the taxpayer usually has to litigate in both jurisdictions, often resulting in uncertainty (OECD, 2010, p. 355). Through paragraph 1, the taxpayer is provided with a remedy to seek resolution of instances of taxation not in accordance with the convention, without having to enter into litigation and more importantly, without having to waive his right to litigation (OECD, 2010, p. 355). Through paragraph 2, the competent authorities are obliged to endeavour, if it's an adequate objection, in an attempt to resolve the cause of the objection (OECD, 2010, p. 37).

The review of paragraph 1 and 2 of Article 25 indicates that there are -seven components to the MAP i.e.:

1. The occurrence of the dispute;
2. The presentation thereof to the Competent Authority;
3. The time within which the taxpayer may present his objection;
4. The justification of that objection;
5. The unilateral resolution thereof;
6. The mutual agreement negotiations; and
7. The implementation of the agreement.

Each of these seven stages is discussed in the commentaries of both the OECD MTC and the UN MTC.

The occurrence of the dispute

The first component to the MAP identified through the words "Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention..." deals with the identification of the taxation not in accordance with the convention. Unlike dispute resolution under domestic law, the taxpayer may initiate the MAP whether or not the tax under dispute has been charged or not (OECD, 2010, p. 357). The OECDs commentary indicates changes of a legislative or regulatory nature may result in a taxpayer identifying that taxation not in accordance with the convention will occur (OECD, 2010, p. 357). Other examples include the identification through self-assessment or through advance proceedings in a regulatory audit (OECD, 2010, p. 357). The UN commentary adds to the OECD commentary in providing more detail to the above mentioned examples of self-assessment and audit proceeding (United Nations, 2011, p. 374). The commentary continues by stating that the taxpayer's objection should only be based on actual facts which are indicative of the contravention to the convention and that a tax authority may not refuse the request because it considers the contravention unproven based on a balance of probabilities (United Nations, 2011, p. 374). It is uncertain whether Competent Authorities who are OECD members may refuse the request on a balance of probabilities as the valid reasons under which a request may be denied is not thoroughly discussed. On the question whether or not a request for MAP is justified the OECD only states that it "urges competent authorities to minimize scenarios where MAP cannot be initiated" (OECD, 2010, p. 23).

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The presentation thereof to the Competent Authority

The second component to MAP, identified through the words "he may, irrespective of the remedies provided by the domestic law of those States, present his case to the Competent Authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national", deals with the presentation of the taxpayer's case to the Competent Authority. The taxpayer is required to present his case either to the state where he is resident (in the year to which the objection relates) or where he is a national (OECD, 2010, p. 358). The latter is only available to the extent that the case is presented under the first paragraph of Article 24, which dealt with the discrimination of taxpayers through forcing tax rules that are either different or more burdensome that those faced by residents (OECD, 2010, p. 358). The commentary does allow for the presentation of objections to either contracting states but only if both contracting states

agree to this in the treaty negotiation process (OECD, 2010, p. 358). Paragraph 1 would subsequently be modified to read “present his case to the Competent Authority of either contracting state”.

The time within which the taxpayer may present his objection

The third component to the MAP, identified through the words “The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention” deals with the time within which the taxpayer may present his case to the Competent Authority. This component protects the Competent Authority against late objection (OECD, 2010, p. 359), but the commentary does allow for any jurisdiction to extent that limitation as is the case with the United Kingdom and Turkey (OECD, 2010, pp. 379,380). The starting point of the three year period should be interpreted in the way most favourable to the taxpayer (OECD, 2010, p. 359) and usually represents the day notification of assessment (even in a self-assessment scenario) official demand or other instrument for collection takes place. The UN MTC commentary reiterates this by placing further emphasis on the “actual physical receipt of the notification, demand or other collection method (United Nations, 2011, p. 377). When there is no clear notification the three year period will commence at the time when “…the taxpayer would, in the normal course of events, be regarded to having been made aware…” (OECD, 2010, p. 360).

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In other scenarios, like the deduction of taxation at source, the three year period within which a taxpayer may initiate a MAP will commence when the income is paid unless the taxpayer can prove he was not aware of the deduction (OECD, 2010, p. 360.). The commentary indicates that the three year period will continue through any domestic proceedings resulting in a scenario where the taxpayer might be forced to initiate MAP before the conclusion of domestic proceeding or even before domestic proceedings are initiated (OECD, 2010, p. 361). Some states may require a taxpayer to initiate MAP before the conclusion of any domestic proceedings, but state that they will only commence with the negotiation process once these proceedings are concluded (OECD, 2010, p. 361). Other states may not be so generous and could request the taxpayer to suspend or withdraw any domestic remedies before the contracting states will settle on any form of agreement (OECD, 2010, p. 361). The reason for this approach is often founded in the view that complete focus should be given to the resolution of the dispute rather than a shared focus between negotiations and domestic proceedings. If

contracting states require that the taxpayer suspend or withdraw domestic remedies, they have to notify the taxpayer of this approach (OECD, 2010, p. 361).

The justification of that objection

The fourth component of the MAP, identified through the words "if the objection appears to it to be justified" deals with instances where the competent authorities may deny the taxpayer access to the MAP. The commentary to the convention does not provide a comprehensive list of scenarios that indicate unjustified applications but it does clearly indicate the circumstances under which a state may deny access (OECD, 2010, p. 361). The commentary does indicate that in cases of treaty abuse (as discussed in the commentary to Article 1 of both the OECD MTC and the UN MTC), that the contracting states may deny a taxpayer the ability to initiate the treaty. The commentary states that in the absence of special provisions no general rule exists for the denial of the MAP and adds that even if a tax charge was made under domestic avoidance provisions, MAP should not be denied without valid reason (OECD, 2010, pp. 361, 364). It also indicates that some states may deny MAP where the taxpayer's violations to domestic law, results in significant penalties while other states may regard certain issues as not susceptible to MAP due to constitutional or domestic legislation (OECD, 2010, p. 361).

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The matter of constitutionality or the application of domestic law as confirmed by Article 27 of the Vienna Convention on the Law of Treaties (OECD, 2010, p. 361), as any domestic legislative impediment not contained in the convention itself should not be considered in the application thereof. There could however be changes in domestic legislation that became affective after the corresponding treaty was negotiation. In those scenarios the convention recommends that the MAP should be suspended until the treaty could be renegotiated, rather than the termination of the process in its entirety (OECD, 2010, p. 362).

The OECD also gives attention to the matter of domestic violations resulting in significant penalties. The OECD's commentary indicates that even though there is "no absolute and clear answer as to whether or not a taxpayer initiated mutual agreement procedure may be denied on the basis that there has not been necessary payment of all or part of the tax in dispute" there should be a real consideration as to the context and the purpose of the convention i.e. the avoidance of double taxation and the prevention of fiscal evasion and avoidance (OECD, 2010, p. 367). The OECD recommends that, as far as it remains possible, states should not withhold access to the MAP if the payment of tax is outstanding (OECD, 2010, p. 376)

The unilateral resolution thereof

The fifth component to the MAP, identified through the words “and if it is not itself able to arrive at a satisfactory solution” deals with the unilateral relief of the double taxation caused by the dispute. The commentary suggests that if the Competent Authority deems the taxpayer’s request for the initiation of the MAP as justified and the nature of the cause can resolved without initiating the MAP i.e. form of unilateral relief, that it may do so (OECD, 2010, p. 363). In this case the issue will be resolved.

The mutual agreement negotiations

The sixth component to the MAP, identified through the words “The Competent Authority shall endeavour… to resolve the case by mutual agreement with the Competent Authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention” deals with the actual negotiation process. The commentary states that if the Competent Authority cannot rectify the issue itself, “it will be incumbent on it, indeed it will be its duty” to initiate the negotiation process as quickly as possible, especially when the issue relates to transfer pricing adjustment (OECD, 2010, p. 363). It is in this stage of the MAP where the question arise, is the MAP merely a negotiation in good faith without the duty of an agreement, or does the inclusion of paragraph 5 to Article 25 result in the contracting states being forced to resolve the dispute? It’s clear that paragraph 2 requires the competent authorities to negotiate but as far as the resolution go, the MAP only states that the competent authorities has the duty to “use their best endeavours” but not necessarily to resolve the incumbent issue (OECD, 2010, p. 364). The OECD commentary believes that the addition of paragraph 5 does allow for an agreement to be reached even in cases where the “best endeavours” of the Competent Authority does not provide results (OECD, 2010, p. 364). The OECD also states that in the process of seeking an agreement, any Competent Authority has to view the position in light of domestic tax laws coupled with the provisions of the convention, which remains binding on them (OECD, 2010, p. 364). If the strict application of both the provisions to the convention and the domestic legislation prevent any possible agreement, a reasonable approach such as the consideration of equity could be adopted in relation to the objection presented (OECD, 2010, p. 364).

The implementation of the agreement

The seventh component to the MAP identified through the words “Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States” deals with the implementation of the agreement reach. Many jurisdictions have statute of limitation contained in its domestic laws preventing the implementation of any agreement resulting from MAP due to time limitations. By adding this section to paragraph 2, the OECD effectively prevents competent authorities from failing to implement agreement due to domestic limitations (OECD, 2010, p. 365). There could however be other limitations as well, but the contracting states are free to agree on firm provisions for the removal of such obstacles (OECD, 2010, p. 365). The implementation of a MAP decision could also be halted by litigation. If a mutual agreement is reached but the taxpayer brought forward a domestic suit in either contracting states, then the taxpayer must be allowed to defer the acceptance of the mutual agreement until judgement is delivered (OECD, 2010, p. 366). Similarly, when a taxpayer has filed a domestic suit, the competent authorities might defer in depth negotiations until such a judgement is delivered (OECD, 2010, p. 366). If the taxpayer had to withdraw or suspend domestic remedies before the MAP could commence, as discussed in the third component, he may still seek those remedies after an agreement is reached by the two competent authorities (OECD, 2010, p. 367). In these scenarios, the agreement can only be implemented once the taxpayer himself accepts the agreement and completely withdraw any suit pertaining to the points settled in the agreement (OECD, 2010, p. 376) .

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Paragraph 1 and 2 of Article 25 aims to provide the contracting states with a remedy to resolve the disputes that may arise in the application of the convention. The seven components of MAP as outlined above with the use of the OECD Commentary, provides clarification as to the intention of the MAP. MAP is intended to facilitate the ultimate purpose of both the OECD MTC and the UN MTC in avoiding double taxation and preventing tax evasion and avoidance.

3.2.3 Article 25 – Paragraph 3

Whereas paragraph 1 and 2 deal with taxpayer initiated MAP, paragraph 3 deals with MAP as a means to reach an agreement on interpretation in the application of the convention in order to avoid possible disputes which aren’t identified by taxpayers. This study only deals with taxpayer initiated MAP.

3.2.4 Article 25 – Paragraph 4

Collectively paragraph 1 and 2 provide an outlay of the entire MAP process, from the initial identification of taxation in contravention of the convention to the ultimate implementation of the agreement. It is paragraph 4 that provides the competent authorities with the authority to negotiate directly with each other. Both the OECD MTC and the UN MTC have a similar paragraph 4 with the UN MTC containing an additional sentence. Paragraph 4 reads as follows (with the UN MTC additional sentence indicated in brackets):

> *"(4) The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs. The competent authorities, through consultations, may develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this Article."*

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As stated, the paragraph allows the competent authorities to enter into negotiations directly with each other without having the possible burden of diplomatic channels (OECD, 2010, p. 371). This negotiation may take many forms including the establishment of a joint commission for the purpose of resolving the issue at hand, however if a joint commission is used the taxpayer(s) whose case(s) will be under review has to be given certain guarantees (OECD, 2010, p. 371). The taxpayer has to be provided with the opportunity to present his case, either through a written submission or an oral presentation. The taxpayer should also have the right to be assisted by counsel (OECD, 2010, p. 371). The OECD also states that it is advisable that the joint commission is chaired by a representative of each contracting state (OECD, 2010, p. 371). In the additional sentence contained in the UN MTC, the contracting states are allowed to develop additional bilateral procedures facilitating any agreement that might be reached (United Nations, 2011, p. 392). The UN further suggests a comprehensive list of bilateral procedures, which can be found in Section C of their commentary to Article 25 (United Nations, 2011, p. 392). The suggestions contained under Section C of the UN commentary to their Article 25 are not exhaustive and could be adapted or changes based on the experiences of different countries (United Nations, 2011, p. 403).

The suggestions under Section C are divided into eight subsections, the most important of which is the first, dealing with the clarification of the rights and obligations of the taxpayer, and the second, providing a list of information the taxpayer has to submit in initiation of the MAP. It is arguable that the clarity provided through the procedural rules suggested by the UN indicates the rights and obligations already outlined in the commentary contained in both conventions, however the same argument can be made that it is the duty of the Competent Authority to provide the taxpayer with this outline. The suggested rules are as follows:

"- *At what stage in a tax matter a taxpayer can invoke action by the Competent Authority under the mutual agreement procedure;*
- *Whether any particular form must be followed by a taxpayer in invoking action by the Competent Authority;*
- *Whether any time limits are applicable to a taxpayer's invocation of action by the Competent Authority;*
- *If a taxpayer invokes action by the Competent Authority , whether the taxpayer is bound by the decision of the competent authorities and whether the taxpayer must waive recourse to other administrative or judicial processes as a condition for the implementation of a proposed mutual agreement reached by the competent authorities;*
- *In what manner, if at all, a taxpayer can participate in the Competent Authority proceedings and what requirements regarding the furnishing of information by a taxpayer are involved."* (United Nations, 2011, p. 404)

The second section to Section C, emphasises the necessity of the taxpayer's cooperation as it directly impacts the successful outcome of the MAP (United Nations, 2011, p. 404). It continues by indicating that, before a Competent Authority can determine if an objection is justified, a comprehensive list of information is required. The information suggested in this list is as follows:

"- *a description of the general background for the case, which would include a description of the business activities of the relevant persons as well as a description of the contracts and arrangements that provide that general background, such as a shareholders' agreement, a partnership agreement, a licence agreement or a project agreement;*

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- *the details of the situation that allegedly resulted or will result in taxation that is not in accordance with the provisions of the Convention, which could include, for example, the details of transactions or events (e.g. a payment or the delivery of a good or service) that were characterised in a certain way by the tax administration of the other Contracting State, supported by all the relevant documentation and, especially, the documents that have been presented to the tax administration of the other Contracting State;*
- *the amounts of income and tax involved (or an estimate thereof);*
- *the relevant financial statements of the person(s) involved in the transactions or activities at issue;*
- *a description of the relevant taxation years or periods affected by the case (in each State, where these are different);*
- *a description of the procedural status of the case in the other Contracting State, e.g. whether a tax audit report has been produced, a tax assessment received, an appeal filed or litigation undertaken; and*
- *a reference to the relevant provisions of the applicable tax treaty and the analysis supporting the claim that there is or will be taxation not in accordance with these provisions (when available, the legal analysis of the tax authorities of the other Contracting State should also be provided)."* (United Nations, 2011, pp. 404,405)

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The remaining sections to Section C relates to adjustments made by either contracting state or the procedures that could facilitate a probable MAP. It includes the suggestion of an "early warning" notification on significant adjustments, correlative adjustments and how they can be implemented and further unilateral procedures that could be taken. Of the remaining sections to Section C, the most important, in my opinion is the suggestion for the publication of Competent Authority procedures and determination. The UN further suggests that competent authorities should publish the consultation process that they would adopt in the MAP (United Nations, 2011, p. 410).

In totality, the suggestions contained in Section C aim to address one of the biggest disadvantages of the MAP i.e. transparency. Dr Altman suggested that "the MAP is generally a non-transparent process that limits the ability of political and interest groups to influence the professional agreements reached by two tax administrators" (Altman, 2005, p. 255), and by

publishing a list of clear procedural rules and information required, the transparency of the process is somewhat enhanced. The advantages and disadvantages of the MAP will be discussed more thoroughly in Chapter 4.

3.2.5 Article 25 – Paragraph 5

Paragraph 5 to Article 25 was first introduced in the 2008 OECD MTC as a supplementary step in MAP facilitating mutual agreement. It allows for inclusion of an arbitration clause that would, if included in a treaty between contracting states, oblige the competent authorities to enter into an arbitration process when timely agreements are not made. Paragraph 5 of Article 25 of the OECD MTC reads as follows:

> *5. Where,*
>
> *a) under paragraph 1, a person has presented a case to the Competent Authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and*
>
> *b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the Competent Authority of the other Contracting State,*
>
> *any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.*

The 2011 update of the UN MTC was amended to contain two alternatives to Article 25, one including their adopted version of paragraph 5 and the other excluding arbitration as a supplementary enhancement (United Nations, 2011, p. 366). In its commentary the UN suggests that countries should first analyse the advantages and disadvantages of both mandatory and voluntary arbitration before adopting the supplementary enhancement provided

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for in the OECD MTC (United Nations, 2011, p. 368). The UN continues by stating that many counties have limited experience with arbitration and should not be forced to adopt it into their negotiations if they don't fully understand the consequences thereof (United Nations, 2011, p. 368).

The suggested paragraph 5 of the UN MTC has three differences to the one contained in the OECD MTC (the fourth as stated in the commentary being the complete exclusion thereof), the first being the time within which a Competent Authority may reach mutual agreement without recourse to arbitration (United Nations, 2011, p. 367). The second and probably most substantial difference is the exclusion of the taxpayer in the request for arbitration. Unresolved issues between two contracting states who negotiated their treaty under the UN MTC can only be requested by either one of the competent authorities (United Nations, 2011, p. 367). The third difference between the two conventions' paragraphs 5 to Article 25 allows the competent authorities to depart from the arbitration decision if they could reach an agreement within six months after the arbitration decision has been made available (United Nations, 2011, p. 367), this is further enhanced by stating (in the UN MTC commentary) that the arbitration process can be halted if both parties can reach a resolution of the unresolved issues that lead to arbitration (United Nations, 2011, p. 403). Paragraph 5 of Article 25 of the UN MTC reads as follows:

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Where,

> *(a) under paragraph 1, a person has presented a case to the Competent Authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and*
>
> *(b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within three years from the presentation of the case to the Competent Authority of the other Contracting State,*

any unresolved issues arising from the case shall be submitted to arbitration if either Competent Authority so requests. The person who has presented the case shall be notified of the request. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. The arbitration decision shall be binding on both States and shall be implemented notwithstanding any time limits in

the domestic laws of these States unless both competent authorities agree on a different solution within six months after the decision has been communicated to them or unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

The commentary to the UN MTC does not provide any substantial insight as to why the UN is of the impression that the changes would provide their members with a more adequate result. The changes provide the UN members, who in many cases are either developing or transitioning economies, with more control over their tax function even if it may result in double taxation. This is also evident by a further suggestion in the UN MTC commentary providing an option for voluntary arbitration as another alternative to the one sided initiation of arbitration (United Nations, 2011, p. 393). The UN suggests that voluntary arbitration allows for greater control over the types of disputes that may be submitted for resolution under arbitration and insists that it provides competent authorities with "greater flexibility" (United Nations, 2011, p. 394). Even though this is true, there is a risk that cases may simply remain unresolved. The UN further provides an example of a paragraph that would supplement the current paragraph 5, in the event that voluntary arbitration is adopted. It reads as follows:

"If the competent authorities are unable to resolve by mutual agreement a case pursuant to paragraph 2, the case, may, if both competent authorities and the person who has presented the case pursuant to paragraph 2 agree, be submitted for arbitration, provided any person directly affected by the case agrees in writing to be bound by the decision of the arbitration board. If the competent authorities are unable to resolve by mutual agreement a difficulty or a doubt pursuant to paragraph 3, the difficulty or doubt may also, if both competent authorities agree, be submitted for arbitration. The decision of the arbitration board in a particular case shall be binding on the Contracting States with respect to that case. Where a general difficulty of interpretation or application is submitted to arbitration, the decision of the arbitration board shall be binding on the Contracting States as long as the competent authorities do not agree to modify or rescind the decision. The competent authorities shall by mutual agreement settle the procedures for such an arbitration board."

As previously stated, one of the main differences between two conventions' paragraph 5 is the reference to who may initiate arbitration. While the UN MTCs paragraph 5 states that it should be the Competent Authority requesting arbitration, the commentary does indicate that some states may align to the taxpayer request, as per the OECD MTCs paragraph 5 (United Nations, 2011, p. 394). Paragraph 5 does not try to take away the powers of either Competent Authority but rather serves as an extension of the current MAP, it therefore also allows for the submission of individual issues that might hinder the resolution of the dispute as a whole. Submission can only take place if the unresolved issues were submitted under paragraph 1 and only once all the procedural requirements are met i.e. justification of the issue and the completion of the two year process commencing once the Competent Authority deems the case justified (OECD, 2010, pp. 371 - 374). Arbitration is also not available if the submission under paragraph 1 resulted from the taxpayer's view that taxation not in accordance with the convention will occur (as discussed under the first component to the MAP) (OECD, 2010, p. 374).

Both conventions' commentaries also deal with the relationship between arbitration and the taxpayer's right to domestic remedies in that the process of arbitration will not be available if any domestic litigation process has already resulted in a resolution of the issue presented under arbitration (OECD, 2010, p. 375). The taxpayer's access to any domestic legal remedies will be the same as those available to him under MAP. In some states, the arbitration remedy will only be made available once all domestic ones are no longer available, this would avoid a conflict in decisions reached (OECD, 2010, p. 376). Both conventions recommend that, when states require a taxpayer to waive any remaining domestic remedies before arbitration can be initiated, paragraph 5 should be amended to state this fact and to provide the taxpayer with some kind of guarantee that double taxation would not occur (OECD, 2010, p. 376).

As previously stated, one of the differences between the paragraph 5 suggested by the OECD MTC and the one UN MTC is the nature of the arbitration decision. Under the OECD, the decision is binding on both contracting states unless the taxpayer doesn't accept it, while the UN provides the competent authorities with a final chance to reach an amicable agreement (United Nations, 2011, p. 402). The OECD commentary does however state that if its members want to divert from the decision reached through arbitration, it has to do so by clearly amending its paragraph to state "or the competent authorities and the person directly affected by the case agree on a different solution", most notably even the amendment still involves the taxpayer

rather, which remains different to the UN's suggestion (OECD, 2010, p. 377). Even though the decision is binding (unless the alternatives is reached), both conventions agree that the arbitration decision will not result in any precedent but nothing prevents the competent authorities to apply the decision under a similar MAP (OECD, 2010, p. 377).

The last sentence in paragraph 5 deals with the "mode of application", which could be included in the article itself if the states so agree (OECD, 2010, p. 377). Alternatively the conventions' suggest this "mode of application" should be a publically available protocol or an established list of diplomatic notes setting out the application of paragraph 5 (OECD, 2010, p. 377). Both conventions also provide a sample agreement (coupled with commentary thereon) and once again, both are similar with the UN Commentary only having minor differences.

3.2.6 Article 25 – Sample Agreement to Paragraph 5

To many of the member countries of both the OECD and especially the UN, the practice of international arbitration won't be common. The sample agreement aims to provide competent authorities with a framework of the "mode of application" suggested in the last sentence of paragraph 5 to Article 25. This framework is divided into 20 paragraphs (UN version only has 19) and although many of them will be familiar to those member countries that have been involved in international arbitration, some of these paragraphs are somewhat unusual.

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Arbitration can be approached in a number of ways, two of which is recommended by the OECD sample agreement and the UN sample agreement. The first is the "independent approach" through which the arbitrators will reach an independent decision based on the facts, arguments and laws pertaining to the scenario (OECD, 2010, p. 387). The second is a process commonly referred to as "baseball arbitration" (also "last best offer" or "final offer" arbitration), through which each Competent Authority will provide the arbitral panel with a proposed solution. The arbitral panel will subsequently base its decision on the solutions provided (OECD, 2010, p. 387). Under the OECD sample agreement, the "independent approach" is suggested as the primary method to be used (OECD, 2010, p. 387), while the "baseball arbitration" is the preferred suggested method by the UN sample agreement (United Nations, 2011, p. 424). None the less, both sample agreements indicate that the competent authorities should select the approach to be taken on a case-by-case basis.

A brief overview of the framework is presented below:

(1) Request for submission of case to arbitration

The request for arbitration has to be made in writing and sent to one of the competent authorities (OECD, 2010, p. 381). In order for the Competent Authority to easily identify the case in question, the submission has to contain all the relevant information (OECD, 2010, p. 381). Together with this request, the taxpayer (or the submitting Competent Authority under the UN MTC) has to submit a declaration indicating that no decision, relevant to the issues submitted, has been made by any court or administrative tribunal (OECD, 2010, p. 381). Under the OECD, the request and declaration has to be submitted to the other Competent Authority involved within 10 days after receipt (this will not be required under the UN example as the original submission is made to the Competent Authority involved) (OECD, 2010, p. 381). The UN example also indicates that no request for arbitration has to be made if the amount of tax involved is less than a bilaterally agreed amount (United Nations, 2011, p. 415). It is interesting to note that the UN example is silent on when the taxpayer should be notified as to the submission for arbitration.

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(2) Time for submission of the case to arbitration

As per paragraph 5 of Article 25, the request for arbitration can only be made after two years (three for UN MTC) and the request will only be valid once a specified list of information is provided (OECD, 2010, p. 381). Both examples are silent on the information that would be required and the commentary to the sample agreement only indicates that this list should be specified. It can therefore be accepted that an information list similar to the one included in either Section C to the UN Commentary on Article 25 or the OECDs MEMAP would be appropriate.

(3) Terms of Reference

Before any arbitration can commence, the competent authorities first have to agree on the "questions to be resolved by the arbitration panel" (OECD, 2010, p. 381). This agreement will constitute the "Terms of Reference", which have to be compiled within 3 months after the

request have been received by both competent authorities (OECD, 2010, p. 382). Interestingly enough the taxpayer has no say in the compilation of the "Terms of Reference" and the competent authorities may even employ procedural rules different from the ones set out in the original "mode of application" (OECD, 2010, p. 382). Changing the procedural rules (or even the power to change) removes the protection provided to the taxpayer through the published "mode of application". When submitting both the MAP and request for arbitration (the latter only under the OECD), the taxpayer cannot anticipate changes to the procedural rules stipulated in the "mode of application" (Gildemeister, 2007, p. 7).

(4) Failure to communicate the Terms of Reference

Paragraph 4 of the sample agreement provides for a remedy should the competent authorities fail to provide the said "Terms of Reference" in the three month period. In this scenario, all parties may submit, to the appointed arbitrators, a list of issues to be resolved. Under the OECD sample agreement the taxpayer may also take part in this submission. (OECD, 2010, p. 382). The submission will then form part of the tentative "Terms of Reference", which would be compiled by the arbitrators within one month. The tentative "Terms of Reference" can be overruled by the Competent Authority if they make a subsequent submission within a one month period (OECD, 2010, p. 382).

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(5) Selection of arbitrators

After the "Terms of Reference" has been agreed, each Competent Authority may select a representative arbitrator (OECD, 2010, p. 417), the taxpayer is not provided with any right to influence this selection (Gildemeister, 2007, p. 7). The two chosen arbitrators will then agree on a third arbitrator, who will then act as chairman. Under the scenario where an arbitrator is not selected within the required period, a representative body (Director of the OECD Centre for Tax Policy and Administration or Chair of the UN Committee of Experts on International Cooperation in Tax Matters) may select the arbitrator within a predetermined period of time (10 days under the OECD and one month under the UN).

(6) Streamlined arbitration process

Both sample agreements provide for a streamlined arbitration process that is meant to be both cheaper and quicker (Gildemeister, 2007, p. 8). The process is commonly referred to as "baseball arbitration", "last best offer" or "final offer" and is also the suggested method for arbitration by the UN (United Nations, 2011, p. 414). Under the UN sample both competent authorities will have two months within which they may present the arbitrators with answers to the questions contained in the "Terms of Reference" (United Nations, 2011, p. 418). The arbitrators will then have three months to decide on each question based on either one of the submissions. Those answers will be communicated and implemented (United Nations, 2011, p. 418). The OECD has a similar but different approach. The streamlined approach is not the recommended method and can be selected if the competent authorities indicated as such in the "Terms of Reference" (OECD, 2010, p. 383). The OECD suggests that both competent authorities should agree on one arbitrator within one month after the finalisation of the "Terms of Reference" (OECD, 2010, p. 383). The rest of the streamlined approach is exactly the same as the UN process with the only change being that the arbitrator is only provided with one month to reach a verdict (OECD, 2010, p. 383)

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(7) Eligibility and appointment of arbitrators

Both sample agreements provide a clear indication as the eligibility of arbitrators stating that "Any person, including a government official of a Contracting State, may be appointed as an arbitrator, unless that person has been involved in prior stages of the case that results in the arbitration process" (OECD, 2010, p. 383). Both the UN and the OECD is under the impression that it would in the interest of the Competent Authority to have a qualified arbitrator, and as such there is "no need for the agreement to stipulate any particular qualifications for an arbitrator" (OECD, 2010, p. 390). The commentary even states that there "may be advantages in having representation of each Contracting State appointed as arbitrators as they would be familiar with this type of issue" (OECD, 2010, p. 390). This is highly contradictory to the fundamental rules and principles of independence found in Arbitration Law (Gildemeister, 2007, p. 8). The absence of any reference to what would be regarded as true independence is due to the probable constriction faced by OECD and the UN in that its members would not want to give up any form of tax sovereignty (Gildemeister, 2007, p. 8).

(8) Communication of information and confidentiality

Arbitrators appointed by the competent authorities will be "designated as authorised representative of the Competent Authority that has appointed that arbitrator or, if that arbitrator has not been appointed exclusively by one Competent Authority, of the Competent Authority of the Contracting State to which the case giving rise to the arbitration was initially presented" (OECD, 2010, p. 383). This merely indicates that the arbitrator is provided with the same access to information and confidentiality restrictions as the Competent Authority he serves. The appointment may be done through a simple letter of employment, but may need a more rigorous confirmation if the domestic legislation of the Competent Authority requires it (OECD, 2010, p. 391)

(9) Failure to provide information in a timely manner

This paragraph provides the competent authorities with an element of protection in cases where the necessary information (as stipulated in paragraph 2 of the sample agreement) was not provided. Under these circumstances the competent authorities may postpone the nomination of the arbitrators with the corresponding time of the delay in providing the said information (OECD, 2010, p. 384).

(10) Procedural and evidentiary rules

Paragraph 10 provides the arbitrators with the power to adopt the procedural and evidentiary rules that they deem necessary in order to provide a clear answer to the questions laid down in the "Terms of Reference". The commentary even suggests that the arbitral panel may refer to established procedural rules, such as the one compiled by the International Chamber of Commerce (OECD, 2010, p. 391). The paragraph does however exclude the use of information that was not available to both competent authorities before the arbitration process commenced, unless both agree otherwise (OECD, 2010, p. 384).

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(11) Participation of the person who requested arbitration (OECD) / Independent Approach (UN)

The paragraph 11 of the two sample agreements differ substantially. The OECD sample agreement provides the taxpayer with the right to address the arbitrators either directly or through the use of representatives (OECD, 2010, p. 384). The UN sample agreement's paragraph 11 does not make reference to any taxpayer participation nor does its commentary. Its corresponding paragraph 11 indicates an alternative to the streamlined approach contained in paragraph 6. In it they provide for the use of an "independent opinion" through which the arbitrators can reach their own decision by following the rules laid out by the UN, which align to the normal approach taken by the OECD. (United Nations, 2011, p. 420).

(12) Logistical arrangements

Unless otherwise agreed by the competent authorities, all logistical and administrative arrangements will be managed by the Competent Authority who presented the case for arbitration (OECD, 2010, p. 384). This includes the employment of administrative staff to assist the Chairman or the arbitral panel.

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(13) Cost

The allocation of the arbitrators' remuneration and other costs relating to the process will be shared equally between the competent authorities but interestingly, the cost of the arbitrator selected will be paid by the Competent Authority that made the selection (OECD, 2010, p. 385). This view is shared by both the OECD and the UN and does seem to indicate a further lack of independence (Gildemeister, 2007, p. 9).

(14) Applicable Legal Principles

It comes as no surprise that the applicable treaty together with the domestic laws of each contracting state will be considered before the arbitration decisions is made (OECD, 2010, p. 385). If the competent authorities wish to extend the scope of the legal principles that could be referenced in reaching the decision, they would have to indicate as such in the "Terms of Reference" (OECD, 2010, p. 385)

(15) Arbitration Decision

Both the OECD and UN sample agreement state that the arbitration decision will be determined by a majority vote in the instances where more than one arbitrator is on the arbitration panel (OECD, 2010, p. 385). The OECD sample agreement extends to the manner in which the decision will be delivered. The arbitral panel has to present its decision in writing together with references to the sources of law relied upon in order to provide the conclusion. Any additional requirements or exclusions can included in the "Terms of Reference" allows. The arbitration decision may also be published if consent is provided by the taxpayer, in these instances the publication will be in a redacted form (OECD, 2010, p. 385).

(16) Time allowed for communicating the arbitration decision

This paragraph is only included in the OECD sample agreement and indicates that the arbitration decision has to be communicated to the parties involved within a period of six months, commencing on the date all the information required to reach a decision was available (OECD, 2010, p. 386). The omission of the paragraph in the UN sample agreement does not seem to indicate a deviation from any time limits but rather indicate that it is implied as becomes evident in paragraph 17 of the OECD sample agreement. Paragraph 16 of the UN sample agreement is reflective of paragraph 17 of the OECD sample agreement (United Nations, 2011, p. 422).

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(17) Failure to communicate the decision within the required period

The sample agreements state that if it so happens that no decision is communicated by the arbitrators, a mere extension of another 6 months will be provided and if they fail to provide for an extension, new arbitrators has to be appointed (OECD, 2010, p. 386). In my opinion, this leaves the arbitration process, as suggested by both the OECD and the UN a little open-ended.

(18) Final Decision

The decision reached by the arbitrators shall be final, unless (under the UN sample agreement) the competent authorities can reach a different solution than the decision reached within 6 months after it was communicated (United Nations, 2011, p. 422). The arbitration decision will also not be final if it is in unenforceable under the domestic legislation or is in contravention of paragraph 5. In this scenario the "request for arbitration shall be considered not to have been made and the arbitration process shall be considered not to have taken place". The option to review has both an advantage and disadvantage. The review process enhances the integrity of the conduct under which tax treaty arbitration is dealt with, but could also be fires as "a loophole for tax authorities unwilling to enforce the arbitration decision" (Gildemeister, 2007, p. 10).

(19) Implementing the arbitration process

Implementation of the decision, as per the above mentioned paragraph, has to commence within a six month period after the parties have been informed of the decision, unless (only under the UN sample agreement) the competent authorities reach another decision (United Nations, 2011, p. 423).

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(20) Where no arbitration decision will be provided

No arbitration decision will be required if the competent authorities notify the arbitrators in writing that they have solved all questions outlined in the "Terms of Reference", but only to the extent that the arbitration decision has not been made (OECD, 2010, p. 387). The resolution will then be considered as resolved under normal MAP.

3.3 MEMAP AND PROCEDURAL FLOW OF AN EFFECTIVE MAP

The analysis of the commentary pertaining to Article 25 provides us with an understanding of MAP as it is envisaged by both the OECD and the UN. As stated by Rixen (2008, p.11), there is no enforcement of the treaties which could also lead to differences in the implementation of the convention. The commentary only enhances the views of the body who compiled the MTC

to which the commentary relates and therefore has no legal binding. Even though the MEMAP compiled by the OECD has no legal binding on its members, it aims to enhance the effectiveness of the MAP by highlighting best practices adopted by some of its members (OECD, 2007b, p. 5). The best practices form a recommended approach and intend to act as a guide on how a MAP should function (OECD, 2007b, p. 5).

3.3.1 Best Practices

The OECD suggests 25 best practices that, when implemented, should provide for an appropriate manner through which a MAP process is generally followed by most OECD countries (OECD, 2007b, p. 5). These best practices are as follows:

Resolving and publishing issues of interpretation or application

The OECD suggests that Competent Authorities improve the implementation of treaties by identifying and pursuing the use of Article 25(3) i.e. clarity on the interpretation and application of a treaty (OECD, 2007b, p. 10).

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Robust use of Article 25(3) power to resolve double taxation

The article also provides for the resolution of cases not covered in the convention and the OECD believes it is closely linked to the fundamental purpose of the MTC. This can only be used for cases not covered if domestic law allows (OECD, 2007b, p. 10).

Principled approach to resolution of cases

The OECD suggests that competent authorities should engage in discussions regarding the principles that they should apply in certain instances and the OECD MTC and OECD Transfer Pricing Guidelines could be used as an appropriate base of principle development (OECD, 2007b, p. 11).

Transparency and simplify of procedures for accessing and using MAP

The OECDs MEMAP suggests that many countries have their own procedural rules when initiating the MAP and a taxpayer should consult the country files before a request is made (OECD, 2007b, p. 13). The MEMAP states that "competent authorities should, where

appropriate, formulate and publicise domestic rules, guidelines and procedures concerning use of the MAP" (OECD, 2007b, p. 14).

Providing complete, accurate, and timely information to the Competent Authority

MAP cases are predominantly fact intensive and the relevance, completeness and accuracy of the information submitted is critical in reaching an appropriate solution (OECD, 2010, p. 16). In order to facilitate the accuracy, completeness and relevance of the information, a required list is provided by the MEMAP (OECD, 2007b, pp. 14, 15).

Allowing electronic submissions

In order to facility the timely submission of all information, the MEMAP suggests that competent authorities allow for electronic submission as it may ease the submission burden of the taxpayer (OECD, 2007b, p. 16).

Allowing early resolution of cases

After a case is adequately submitted to a Competent Authority , the acceptability of the matter will have to be considered. The MEMAP suggests that there are four key elements that competent authorities consider before a submission is accepted (OECD, 2007b, p. 17). There has to be (a) a section in the convention covering the issue, (b) actions in one or two of the countries involved is in contravention of that issue, (c) the issue is submitted in the correct time limits and (d) is the objection is justified (OECD, 2007b, p. 17). The OECD suggests in the best practice that the Competent Authority should provide for a pragmatic alternative to resolve qualifying cases at an early stage before extensive costs are incurred (OECD, 2007b, p. 18)

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Earlier notification of a potential case

The MEMAP also suggests that the taxpayer file for a MAP as soon as it becomes evident that there will be a potential MAP. It also states that the point will be identified through the probability of taxation not in accordance with the treaty not with the possibility thereof (OECD, 2007b, p. 19)

Liberal interpretation of time limits and advising of treaty rights

The MEMAP also requests competent authorities to be liberal in their interpretation of the time limitation when requesting the initiation of MAP especially when those time limitations are not excessively over the suggested timelines (OECD, 2007b, p. 20).

Avoiding exclusion from MAP relief due to late adjustments or late notifications

The MEMAP further suggests that the Competent Authority as a best practice should even go as far as to notify taxpayers of the availability to MAP when adjustments are made (OECD, 2010, p. 21).

Consideration of MAP assistance for cases described as "tax avoidance"

There is also no clear indication in either convention as to what constitutes a "justified" submission but reference is made to instances of tax avoidance and penalties. To that note the MEMAP adds to the suggestion contained in the commentary that the mere instances of tax avoidance should not necessarily make the submission for MAP unjustified (OECD, 2007b, p. 22). The MAP also urges competent authorities to minimize scenarios where MAP cannot be initiated and states that, when it's a matter of domestic law, the exceptions should be clearly stated together with an explanation as to the legal bases of the exception (OECD, 2010, p. 23).

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Countries eliminate or minimise "exceptions" to MAP

The MEMAP suggests that it would be considered in the best practice of all parties if countries could rectify any domestic legislative restrictions that might not align to the use of MAP as a dispute resolution method.

Taxpayer presentation to the Competent Authority

Another clarification required pertaining to the MAP is taxpayer involvement. Even though the OECD MTC commentary does allow for taxpayer involvement (whereas it is very limited under the UN MTC Commentary), the MEMAP reiterates this view even further. Even though the discussions are bilateral in nature and protects both competent authorities, the MEMAP suggests that it could be in everyone's interest if the taxpayer is involved through presentations (OECD, 2007b, p. 24). Presentations could take the form of written or oral submissions and could be crucial in the clarification of issues (OECD, 2007b, p. 24).

Cooperation and transparency

Many indicate that the MAP process isn't transparent and some businesses even had the perception that MAP is a "black hole" where disputes disappear (OECD, 2004, p. 3). The MEMAP suggests that cooperation and regular updates through communication will enhance the transparency of the process and be beneficial for all parties (OECD, 2007b, p. 25). The feasibility of his could however be costly and time consuming.

Face-to-face meetings between Competent Authorities

The next stage of the MAP would undoubtedly be the negotiation process. The MEMAP suggests that it would beneficial if the competent authorities compile a clear and concise position paper on the issues to be negotiated (OECD, 2007b, p. 26). A list of relevant information that should be addressed in the position paper is also provided (OECD, 2007b, p. 26). Even if the position papers are thoroughly documented and aid in the negotiation process, the MEMAP still suggests that the most adequate way of entering into these negotiation is face-to-face (OECD, 2007b, p. 28). In face-to-face negotiations discussions could be more fluent and open and could lean towards situation where a middle ground is reached, documentary negotiations can be very time consuming and impersonal, which only aids to a resolution not being reached (OECD, 2007b, p. 28).

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Bilateral process improvements

The MEMAP states that some Competent Authorities devote considerable time to bilateral and even multilateral deliberations on both process and substantive issues which have enhanced the MAP process and further suggests that when treaty partners who have significant caseloads should make use of previous understandings as road maps for continued improvement (OECD, 2007b, p. 29).

Decision summaries

When these negotiations lead to a decision, the competent authorities are urged to debrief the taxpayer, summarising the negotiation process and the decisions reached (OECD, 2007b, p. 30). This should be done after the competent authorities confirm the decision reached through a process where they exchange confirmation letters (OECD, 2007b, p. 30). The exchange of these letters would help the Competent Authority to effectively debrief the taxpayer and to clearly state any terms and conditions that might result out of the resolution (OECD, 2007b, p. 31).

Recommendation for MAP cases beyond two years

The MEMAP suggests that when Competent Authorities fail to conclude an agreement within two years that senior officials of the Competent Authorities agree to a reasonable extension to ensure they meet the 3 year mark (OECD, 2007b, p. 32).

Avoid blocking MAP access via audit settlements or unilateral APAs

MEMAP suggests that it is a best practice to avoid the inclusion of a waiver to access MAP through audit settlements as it will be inappropriate for two parties to conclude on a matter when a third is involved (OECD, 2007b, p. 35). The MEMAP further states that the taxpayer might not realise the full implications of settlement and that unilateral settlements is not necessarily beneficial to Competent Authorities (OECD, 2007b, p. 35).

Interest relief

The MEMAP states the Competent Authorities should consider more flexibility in their interest relief provisions to diminish any undue interest burden when MAP negotiations are underway (OECD, 2007b, p. 37). This will be more beneficial to the taxpayer especially when the MAP process is extended over the entire suggested time frame.

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Suspension of collections during MAP

Another interesting best practice suggested through the MEMAP is the suspension of tax collections during the MAP process (OECD, 2007b, p. 37). Suspension or deferral of collection could be detrimental to the Competent Authority especially when considering a taxpayer's ability to settle payment but it is none the less considered to be a best practice.

Readily available access to the Competent Authority

The MEMAP states that countries should clearly identify their Competent Authority and that country profiles should be kept up to date. The Competent Authority should also be readily available and close enough to each case to ensure timely resolution when decisions should be made (OECD, 2007b, p. 39).

Independence and resources of a Competent Authority

It is also recommended as a best practice that the Competent Authority remain removed from the audit function of a government's tax administration. The primary objective of the

Competent Authority should by no means be reliant of those objectives carried by the other sections of a tax administration (OECD, 2007b, p. 41).

Performance indicators for the Competent Authority

As a best practice, Competent Authority's performance indicators should be based on the consistency, the time to resolve cases and the principles applied in doing so. The amount of tax generated for the tax administration should never be a performance indicator of the Competent Authority (OECD, 2007b, p. 42).

Implementing and promoting ACAP and bilateral APA programs

The last best practice suggested by the OECDs MEMAP is the active promotion of an Accelerated Competent Authority Procedure (ACAP) and the use of Advance Pricing Arrangements (APAs). An ACAP will have its own requirement and the Competent Authority should make those requirements clear in order for taxpayers to apply to such an accelerated process. The use of APAs should also be stated in the country files and should be considered as the most appropriate use for a variety of cases, most predominately Transfer Pricing (OECD, 2007b, p. 43).

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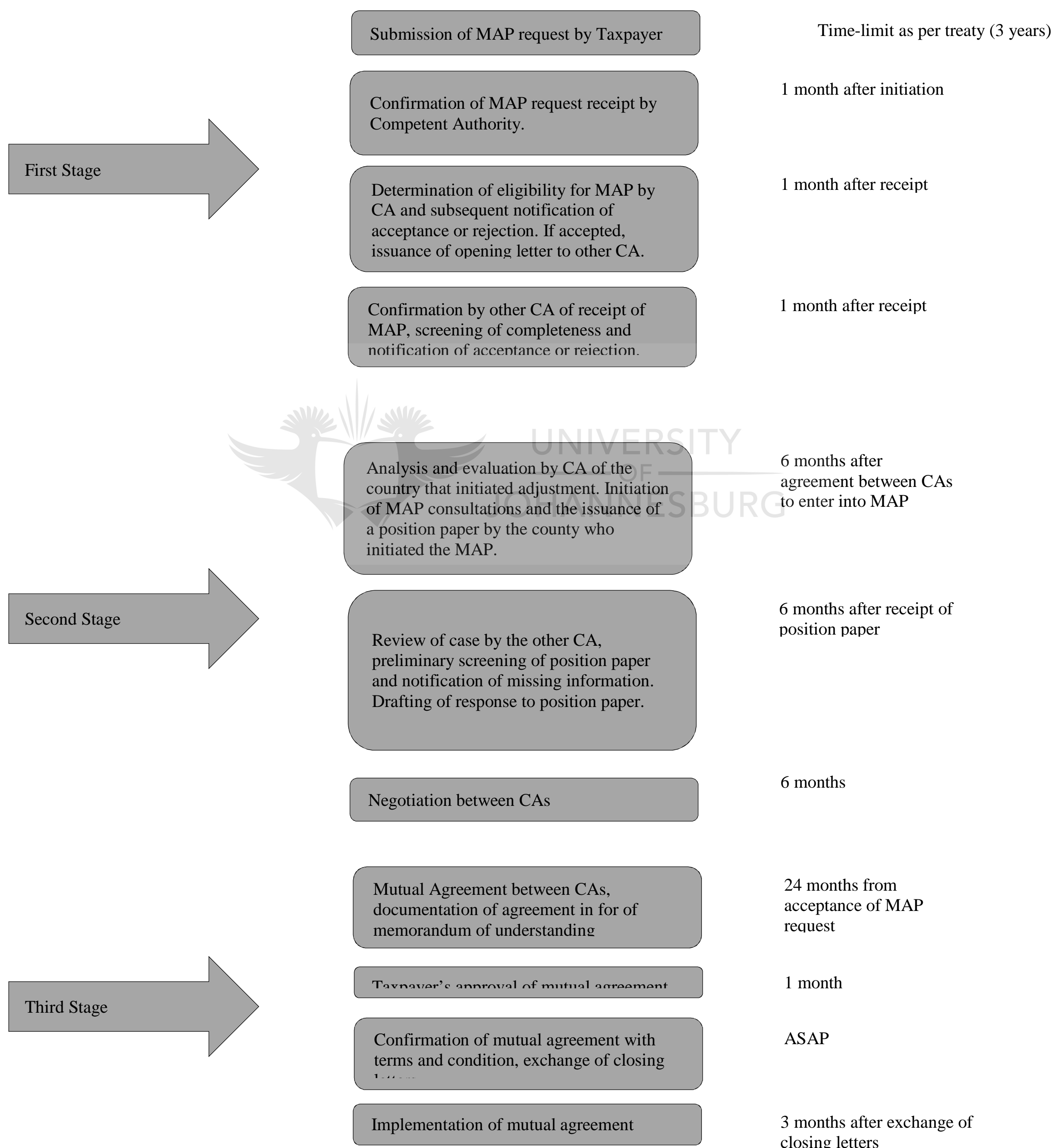
3.3.2 Effective Flow of MEMAP suggested timeline

Linking into the best practices set out in the MEMAP, the OECD also included an effective procedural flow which can be used as a timeline. This flow is illustrated below.

Figure 1: An effective procedural flow of a MAP



(OECD, 2007b)

3.4 SUMMARY

In Chapter 3 a better understanding was gained of the suggested MAP and how it should be implemented according to the commentaries of both the OECD MTC and the UN MTC. We also looked at the OECDs suggested MEMAP in order to understand the OECDs initial intention. This documentary analysis only provided us with the understanding of MAP and how it's envisaged to resolve tax treaty disputes but it is also evident that it required reform. This is evidenced by the introduction of paragraph 5 to article 25 of both conventions. In order to meet the overall objectives of this study we need to identify whether or not these changes were adequate or if the MAP as it currently stands requires further amendment to provide all parties with a more acceptable result. In Chapter 4 we will look at the advantages and disadvantages of MAP as a dispute resolution method and determine if there's a possible enhancement eliminating some of the disadvantages presented in the process whilst maintaining the advantages it presents.

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CHAPTER 4 - ADVANTAGES AND DISADVANTAGES OF MAP

4.1 INTRODUCTION

This study aims to determine whether or not the MAP is an effective process through which international tax treaty disputes can be resolved. MAP is designed in such a way as to provide a taxpayer with a remedy in cases where taxation not in accordance with the convention occurs. This remedy is structured in such a way as to promote the intention of the tax treaties i.e. facilitating international trade and address the objectives of both the taxpayer and the Competent Authority of each state.

In Chapter 3 the understanding of the dynamics and procedural flow of the MAP was obtained. In this Chapter we will focus on the effectiveness of the process through highlighting the advantages and disadvantages of the MAP. The advantages and disadvantages of the process are viewed differently depending on the perspective of the parties involved. Therefore this chapter will also seek to highlight the objectives of the taxpayer compared to those of the competent authorities. This chapter will ultimately consider whether or not it would be possible to resolve some of the disadvantages without diminishing the advantages of the MAP. This will be achieved through an analysis of Dr Altman's institutional design as a possible means to enhance the current dispute resolution mechanism.

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4.2 OBJECTIVES OF DISPUTE RESOLUTION

Competent authorities serve governments who aim to maintain diplomatic relationships, especially with the countries in their treaty network. Taxpayers make use of that treaty network to facilitate international trading and to establish ground rules applicable to the taxation of the income generated through international trade. The tax treaties negotiated with the use of the convention provides a consistent platform that the taxpayer can use, but as stated by Rixen (2008, p. 11) there is no external enforcement providing for the consistent application of that platform. While tax authorities will apply the treaties in good faith, differences in the application can still occur resulting in what the taxpayer may perceive as taxation not in accordance with the convention. The taxpayer has recourse through MAP and while it is the duty of the Competent Authority to endeavour to resolve the dispute, it is only natural that the

competent authorities will give preference to their own objectives in the undertaking. While the objective to resolve the issue at hand is shared by both the taxpayer and the competent authorities, they might not share the underlying objectives in the resolution process. The objectives of taxpayers and competent authorities were analysed by Dr Altman where he categorised them in five different groups (Altman, 2005, p. 244) of which the main ones are referenced below.

4.2.1 Objectives of Governments

Competent Authorities act on behalf of governments whose main focus is to widen its tax base as far as possible without hindering international trade and capital investments. Governments would also like to establish their own tax policies, legislation and collection process whilst maintaining simplicity which enhances compliance by all parties (Altman, 2005, p. 245). Governments would like to maintain that control when disputes arise while maintaining diplomatic relationships and therefore would prefer a dispute resolution mechanism that promotes resolution through amicable proceedings. This mechanism should be cost effective, flexible, quick and private (Altman, 2005, pp. 245-247).

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During dispute resolution, governments would also prefer little to no taxpayer involvement to ensure that the process is resolved through diplomatic means that is flexible in its application (Altman, 2005, p. 249). Governments would also prefer an element of flexibility in interpretation with limited international pressure, thereby ensuring that they could maintain control over the facts and circumstances of disputes (Altman, 2005, p. 247). This flexibility is not shared when it comes to recourse. Governments would favour mechanisms that don't provide the taxpayer with domestic recourse to ensure that the time and revenue invested in the dispute resolution is not in vain (Altman, 2005, p. 250).

4.2.2 Objectives of Taxpayers

The taxpayer's main objective is driven by profitability and would therefore like to remain in control of the factors driving profitability, one of which would be its tax expense. Whilst it cannot control the tax levied, it can manage it by making use of predetermined rules. A taxpayer would prefer these rules to be consistently applied without change. A taxpayer would therefore prefer a dispute resolution process that is consistent, quick, transparent, and cost effective and

most importantly avoids double taxation (Altman, 2005, pp. 245-248). For similar reasons, a taxpayer would prefer that tax collection be suspended during dispute resolution (Altman, 2005, p. 247). The taxpayer would also like to be involved in this process to ensure that his objectives are met (Altman, 2005, p. 245).

4.3 ADVANTAGES AND DISADVANTAGES

In an ideal situation the objectives of both the taxpayer and the governments should be met. Unfortunately the objectives of governments take precedent as taxpayer objectives don't necessary carry the same weight. Even though all parties' objectives aren't obtainable the MAP still carry various advantages. These advantages are not always shared leading to some scenarios where the advantages presented by MAP are enjoyed by only one of the parties involved.

4.3.1 Governmental Advantages of MAP

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As stated, one of the main objectives of Governments, in relation to tax collection is sovereignty. The current MAP preserves sovereignty in that Competent Authorities maintain control over the application of the treaty as they must first determine their position in light of domestic legislation (OECD, 2010, p. 364). As there is no external body enforcing the application of the treaty (Rixen, 2008, p. 11), Competent Authorities are provided with the freedom to interpret the rules to their benefit. Competent Authorities are even provided with the opportunity to enhance sovereignty in the arbitration process as they are allowed to select their own arbitrator (OECD, 2010, p. 382). Any adverse application does not result in reputational risk as it would with other formal procedures. Many countries rely on the MAP as their sole authority to determine whether or not to engage in MAP with another country. This controls the management of potentially damaging cases. The lack of an objective international body providing clear precedence in cases where unclear rules and ambiguity exist provides Competent Authorities with the opportunity to successfully hide without damaging its reputation (Altman, 2005, p. 253). Linking into the flexibility of the MAP is the negotiation process itself. MAP provides for a process of finding an agreeable resolution to existing disputes conducted through "the possible creation of value rather than the distribution thereof" (Altman, 2005, p. 253).

Because MAP is a negotiation process through which Competent Authorities "endeavour to resolve" the dispute (Ault, 2013, p. 3), it doesn't harm established international relations between jurisdictions. Competent Authorities are not required to have open and transparent negotiations as this is not required by the OECD Commentary (OECD, 2010, pp. 354 - 396), but the MEMAP does advise the process to have taxpayer involvement. This is once again not a requirement which provides the Competent Authorities with additional protection. Further protection lies in the overall conclusion as it doesn't allow for precedent and the level of taxpayer involvement. Taxpayers' views are only considered but not dependent. This takes away any scenarios through which a taxpayer will opt to pay his tax liability only in the state where it would be most preferential (Altman, 2005, p. 256). From an administrative perspective, the MAP is fairly inexpensive with little to no administrative burden, especially when compared to most domestic and international litigation procedures (Altman, 2005, p. 254).

4.3.2 Taxpayer Advantages of MAP

The taxpayer doesn't share in many advantages to the MAP process with the only advantageous element being cost. No additional costs, other than the potential payment of the double taxation, are incurred by the taxpayer. There could be more costs involved if the taxpayer makes use of advisors to initiate contact with the Competent Authority and, if allowed, present his case to the arbitration tribunal. Dr Altman does however indicate other benefits that indirectly benefit the taxpayer (Altman, 2005, p. 264). Because the process is based in negotiation in an amicable fashion, it can be perceived that when a decision is reached, both competent authorities will implement it due to their involvement in the conclusion (Altman, 2005, p. 266).

The level of knowledge each Competent Authority has in relation to both the treaty and domestic legislation in question should provide the taxpayer with confirmation as to the professional conduct of the negotiating parties, potentially limiting misunderstanding, time and cost (Altman, 2005, p. 266). It can also be argued that another advantage shared by the taxpayer is his guarantee to an objective neutral party which could ultimately assesses his situation, if the case is submitted to the domestic courts, a process which remains open even during the MAP process (Altman, 2005, p. 266). The taxpayer may even opt to reject the MAP conclusion if it's not to his benefit and seek further result through domestic remedies. This does not guarantee it of a similar result (Altman, 2005, p. 267). Another perspective shared by Dr

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Altman is the possible benefit the taxpayer enjoys by not being involved in the process itself. The additional time provided to the taxpayer whilst the Competent Authorities negotiate may provide them with a tactical edge to consider any further recourse (Altman, 2005, p. 267) however the benefits enjoyed by being part of the negotiation process should substantially outweigh this.

4.3.3 Disadvantages of the MAP

It is more often than not that the disadvantages of the MAP process are mentioned. It's also the disadvantages of the MAP that resulted in the creation of the JWG (Gildemeister, 2007, p. 3). Prior to the introduction of paragraph 5 to article 25, the main disadvantage of the MAP was the time constraints it provided (Gildemeister, 2007, p. 2), coupled with the possibility that no result will be obtained. This ultimately resulting in the purpose of dispute resolution not being met. The uncertainty that the MAP entailed had an effect on taxpayers requesting the process and even when taxpayers elected to use MAP, the lack of transparency and legality of the process meant taxpayer rejection remained high (Gildemeister, 2007, p. 3). Since the introduction of the arbitration and procedural best practices through the MEMAP, some of these disadvantages or shortcomings were addressed. This does not however address all the shortcomings the MAP presented. The main shortcoming of MAP remains as there is no legal obligation forcing the Competent Authorities to reach a solution. It is, therefore entirely possible that double taxation will remain after the MAP was initiated. This could also impacts administrative cost as Competent Authorities invest their limited resources, time and capacity in understanding each dispute before approaching the Competent Authority of the other contracting state. All this administrative costs are in vain when no solution is reached (Altman, 2005, p. 259).

In the initiation phase the Competent Authority still has the right to reject the taxpayers request for MAP (OECD, 2010, p. 363) . The commentary suggests that it's the Competent Authority's duty to consider if the request is justified and if it appears to be, this process has to be initiated. Currently, there is no clear indication as to the requirements of justification, which adds to the transparency issues. In addition to this, the level of taxpayer involvement in the MAP still adds weight to the insufficiencies of the process. Taxpayers remain at the mercy of the Competent Authority as there is no guarantee that its objectives would be met. Depending on the process and the guidance provided by Competent Authorities regarding arbitration, the taxpayer has no

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involvement in the entire process other than the submission of facts to the Competent Authority and the subsequent submission of facts to the arbitration tribunal. The taxpayer seems excluded from all Competent Authority deliberations and has no way to enjoy official or guaranteed status updates (ICC, 2001, p. 2). Even if the negotiations between the Competent Authorities result in the resolution of dispute through avoiding double taxation, the taxpayer remains completely uninvolved. There is also no guarantee to the taxpayer that this result will conform to domestic or treaty laws or that it won't be affected by other pending MAP cases (ICC, 2001, p. 3). The time to resolution still remains a concern as the overall process can take as long as 5 years in which the economic environment in which trade was initially conducted could have evolved substantially. The process was developed to find strength in direct communications which should have provided prompt resolution, however the evidence gathered by Dr Altman pre-arbitration indicated that this was not the case (Altman, 2005, p. 254). Does the process of arbitration really allow for quicker proceedings or would it only add to further delays?

Dispute resolution finds itself firmly in the first and most notable objective of tax treaties i.e. the elimination of double taxation. However, one of the most undermined disadvantages or weaknesses of MAP lays in the second objective i.e. the facilitation of trade and capital investment. The most damning administrative costs stemming from MAP is founded in the mutual compliance to the process especially if those negotiations are conducted by a developed and developing country. If developed countries remain strong in the negotiations and aren't governed to force compliance, it could negatively affect the barriers that facilitate trade and capital investment. If the developed country firmly rejects compliance to the treaty obligations it would be the developing nation which would be forced into unilateral relief to maintain the inflow of capital and preserve the investments currently enjoyed (Altman, 2005, p. 257).

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4.4 DR ALTMANs INSTITUTIONAL DESIGN

The MAP clearly has both advantages and disadvantages, especially for Governments whose main aim is to increase their tax base. However, one of the reasons for reform by the OECD as stated during the assembly of the JWG is to address the ineffectiveness of MAP resulting from the rapidly increasing volume and complexity of the cases submitted (OECD, 2004, p. 3). The global environment is continuously expanding and in my opinion the rapid evolution of trade in developing economies will only result in in the volumes and complexity of future disputes becoming even more cumbersome.

In Dr Altman's study he sets out a proposed institution design that might be able to facilitate dispute resolution in a manner that could ultimately result in the most affective resolution. It has to be considered whether this design would still be applicable as it was developed at a time where arbitration has not been incorporated into the MTC. Dr Altman states that the first step in creating a design would be to address the objectives. In order to outlay these objectives, enforcement and pragmatism has to be considered (Altman, 2005, p. 352).

He is of the opinion that an institutional design to the resolution of international tax treaty disputes will only be successful if that design is in fact, international in nature. International enforcement does contradict the principles of sovereignty, meaning that international enforcement will only be successful if enacted domestically (Altman, 2005, p. 351). The other fundamental issue faced when trying to envisage an international institutional design to international tax dispute resolution is pragmatism (Altman, 2005, p. 352). Pragmatism intertwined with the domestic enforcement as both could be delusional. Dr Altman divides his institutional design objectives into core objectives, secondary objectives and pragmatic concerns (Altman, 2005, pp. 352, 353).

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4.4.1 Core Objectives

The core objectives of an institutional design to the resolution of international tax treaty disputes are similar to the objectives that form the foundations of the MAP i.e. flexibility in application, promotion of trusted exchange of information and the reduction of administration costs. The other core objectives outlined by Dr Altman seem to link into the objectives of the MTC, and thereby indirectly forms part of the MAP. These are the prevention of double taxation, the removal of barriers hindering international trade and investment and the prevention of fiscal evasion (Altman, 2005, pp. 352, 353). The other objectives forming the core of Dr Altman's institutional design seems to address the shortcomings of MAP i.e. enforcement of the outcome (to all the parties of the dispute in question), a pragmatic outlay providing clear rules and guidance for the resolution of future disputes and the promotion of tax treaty compliance and the establishment of a new dispute resolution mechanism (Altman, 2005, p. 353). A comparison of the objectives outlined by Dr Altman to the ones envisaged by both the taxpayer and the competent authorities in question, provides a clear indication that if all these objectives were to be met, it would ultimately result in the advantages for all parties. As previously stated, governments' main objective is to widen its tax base without hindering

trade and investment. Thus the removal of barriers hindering trade coupled with the resolution of tax disputes will result in widening of the tax base, not in legislative change but volume of trade. When the objectives of Dr Altman is compared to the main objective of the taxpayer i.e. increased profitability, it is evident that these objectives will ultimately align with the taxpayers' through consistent application of the rules used to resolve tax disputes resulting from trade. It is not the core objectives of Dr Altman's design but rather the pragmatic concerns that hinder the implementation of his or similar design, especially when considering the enforcement of the outcome.

4.4.2 Secondary Objectives

The secondary objectives outlined by Dr Altman's design lies in the morality of taxation. The promotion of domestic and international economic growth and the increased cooperation in other tax related matters will further enhance the conclusion of international tax disputes. It is also in the secondary objectives where Dr Altman addresses the taxpayers' reluctance to submit any possible disputes to MAP as he states that the participation from both the private and public sector will be required. He further states that if a link could be established between international trade systems and taxation it would be beneficial as international trade is developed to a level not enjoyed by international tax (Altman, 2005, p. 353).

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4.4.3 Pragmatic Concerns

As previously stated, the main stumbling block of an international institutional design for the resolution of tax disputes is the reality of its implementation. The preservation of sovereignty is the main pragmatic concern outlined by Dr Altman (Altman, 2005, p. 353). It is interesting to note that all other concerns highlighted stem from the sovereignty principles, these are as follows:

- The considerations of domestic and constitutional concerns;
- The resolution of integrate conflicts in an amicable manner;
- The balance of transparency, precedents, taxpayer participation and direct discussion between competent authorities;
- The impact an institution of this nature would have on future treaty negotiations;
- Administrative costs while maintaining independence; and

- Addressing the concerns of taxpayers fearing the relinquishing of sensitive information.

(Altman, 2005, p. 354)

The institutional design suggested by Dr Altman tends to link into the argued need for an International Tax Organisation ("ITO"). The concept of an ITO has been discussed as early as 1996 by the retired head of the IMF Fiscal Department, Vito Tanzi, who stated that globalisation creates cross-border tax issues that defy the territoriality principles (Jones & Brown, 2007, p. 718). The goal that he sees with an ITO is an international organisation that supervises and influences tax developments that have transnational effect; a so-called global harmonisation that mimics international financial accounting harmonization.

Dr Altman's use of an ITO is founded on different principles that don't necessarily mimic harmonisation of international financial accounting but rather a central source of advisory or even legislative opinion. This opinion has to be legally enforced through a domestic court and if further work through an arbitration mechanism is required, this process will be managed by ITO in an independent transparent fashion (Altman, 2005, p. 394).

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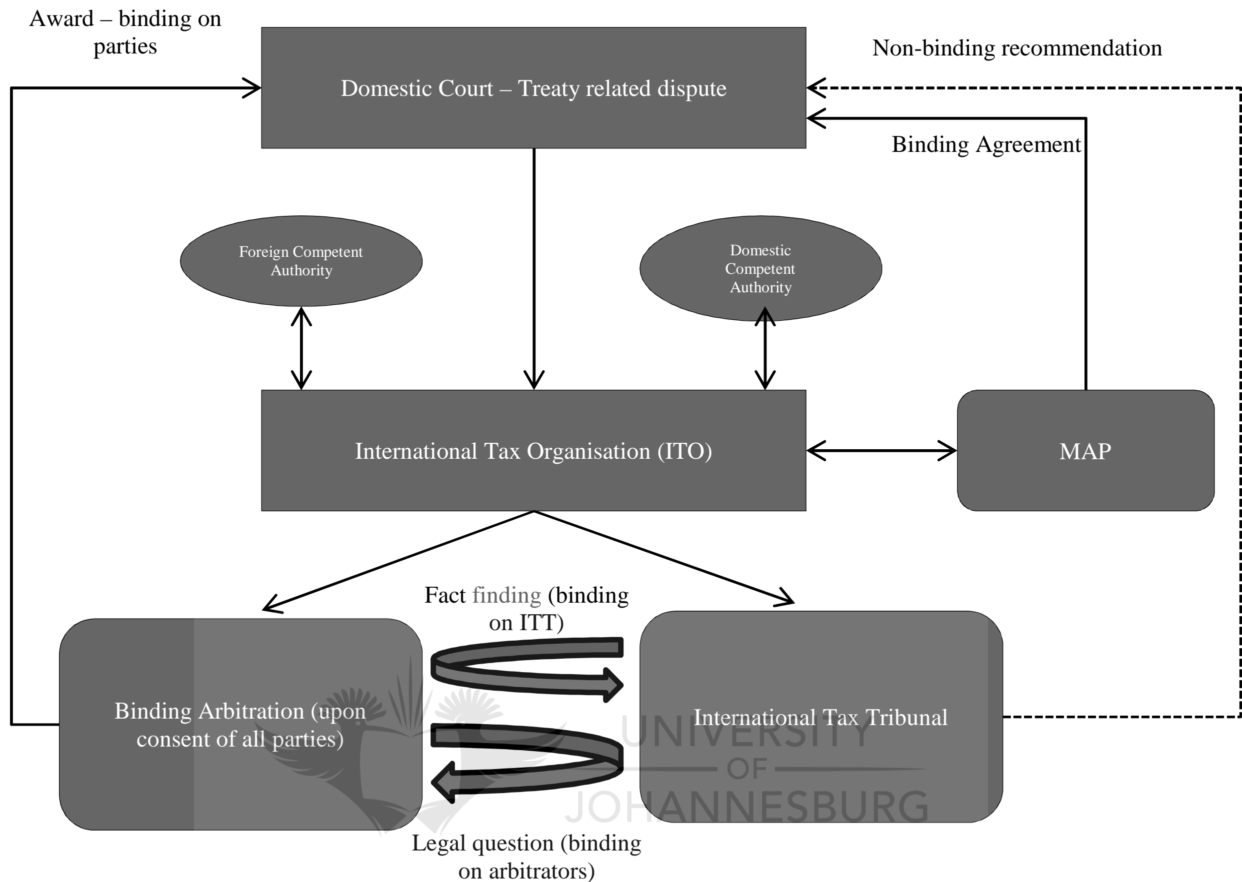
4.4.4 The institutional design

Figure 2: Dr Altman's institutional design



(Altman, 2005, p. 395)

4.4.4.1 International Tax Organisation (ITO)

Over the years many of the global organisations in existence have created a reputation that it does not have in mind the best interest of all parties. From the International Court of Justice (ICJ) lack of tax knowledge to the UN's apparent reputation as being riddled with corruption and slow bureaucracy, even the OECD with its "members only" reputation (Altman, 2005, pp. 402-405). It is for the reasons of non-inclusion, non-conformity or incompetence that Dr Altman suggests that the ITO (or as he states in his research the Global Tax Organisation), should be a new establishment that would not carry the burden or reputation of past politics, dependencies or practice (Altman, 2005, p. 404). It would be the ITO's responsibility to ensure the independence and transparency of all aspects of the process and to manage the outcome,

timelines and communication. The ITO will be the core of the institutional design and the entity that ensures compliance and ultimate resolution.

4.4.4.2 Referrals

The most important aspect of the institutional design is the initial referral. For it to be successful the referral mechanism has to be incorporated in tax treaties and according to Dr Altman, this should take precedent over taxpayer specific MAP but in no means should it take away the MAP process as it remains a crucial dispute resolution mechanism (Altman, 2005, p. 417). Dr Altman did however suggest the reform of the MAP process in order to allow for additional arbitration or adjudication, which has since been adopted (OECD, 2007a).

In the institutional design submissions or referrals can be made by the domestic courts who would seek resolution of the disputes in question directly from the ITO (Altman, 2005, p. 405). It wouldn't be the only referral mechanism as the competent authorities would still have the authority to initiate the process as with the current process (Altman, 2005, p. 408). It is also suggested that referrals be made anonymous as to protect the taxpayer further but Dr Altman also indicated that tax administrators would not agree to this.

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4.4.4.3 International Tax Tribunal (ITT)

In his research Dr Altman determines that the establishment of a tribunal working under or in conjunction with the ITO is crucial as it would be able to realise goals that other forms of dispute resolution are not able to achieve (Altman, 2005, p. 431). Through the ITO domestic courts can consult the ITT on issues pertaining to treaty interpretation and application. The ITT would then provide the domestic court with an advisory opinion which they could aid then in their domestic enforcement and resolution of the matter. This provided governments with a method to achieve international conformity in interpretation and maintenance of sovereignty (Altman, 2005, p. 31). In addition, it would also provide for adequate substance over form doctrine to be considered in interpretation and application, something which have not been required previously and resulted in treaty abuse, tax avoidance and tax evasion (Altman, 2005, p. 431).

4.4.4.4 Process

Dr Altman's institutional design is elaborate but contains all the principles of independence, transparency and sovereignty. In the first phase of the process, the dispute is submitted through the initiation of MAP with clear and effective deadlines and elements of taxpayer involvement (Altman, 2005, p. 418). If the MAP process renders an amicable conclusion, that conclusion will be provided to the domestic court and would be binding on the domestic court's decision making. If the dispute is not settled or the taxpayer does not agree with the outcome, the dispute will move to the second phase (Altman, 2005, p. 394).

In the second phase, the dispute is submitted to binding arbitration but only where all parties agree. In this phase industry experts could be used to analyse the factual elements of each case. All questions of law should be submitted to the ITT of which the legal findings would be binding on the arbitrators (Altman, 2005, p. 394). The arbitrators' decision will be communicated to the domestic courts where it will be incorporated through the correct domestic legal procedures.

If the parties can't agree on binding arbitration or the domestic courts require clarification on treaty law then the case can be submitted to the ITT (Altman, 2005, p. 394). The composition of the ITT should allow for the legal interpretation by expert tax judges. Once the legal interpretation is finalised it would be provided to the domestic courts as an advisory opinion which would be considered in reaching the court's conclusion (Altman, 2005, p. 395).

In essence the institutional design as developed by Dr Altman tries to allow for the realisation of the objectives of all parties to a dispute whilst focussing on the advantages of current procedures and aiming resolve the dispute in question. The domestic court will ultimately reach a conclusion either through MAP, arbitration or an advisory opinion. Its conclusion will be binding on the taxpayer and governmental entity.

4.4.5 Advantages and Disadvantages

4.4.5.1 Governmental Disadvantages

The main concern seems to be the costs associated with the process. The cost element seems to be both an advantage and disadvantage presented by Altman's institutional design. He is of

the opinion that the main costs borne by governments resulting from tax dispute resolution should decrease once international pressures builds around compliance to a global institutional design (Altman, 2005, p. 445). Initially the cost structure associated with dispute resolution will also change as reliance will be placed on domestic courts to maintain sovereignty whilst making use of an ITO. This will also affect the cost of the taxpayer as litigation costs will increase as a result of a legalistic dispute resolution mechanism. A legalistic dispute resolution mechanism will also create uncertainty as to time limitation. Appeal procedures and court proceedings may alco create additional costs to both governments and taxpayers (Altman, 2005, p. 448).

In addition to the legalistic costs, the costs associated with the incorporation of a global institutional design as proposed by Dr Altman remain a major disadvantage. As Dr Altman correctly states, this cost is not only financial as experience in dispute resolution will be crucial for the success of an institutional design of this nature together with the reputational cost associated with convincing governments that this method would result in beneficial resolution. Another cost concern would be the extent of day to day running costs which would be substantial if you consider the level of expertise that should be employed by an institution of this magnitude (Altman, 2005, p. 449).

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There are other disadvantages that will influence the pragmatism of this approach. Stronger economies have more leverage during the negotiation and the use of an ITO will eliminate any advantages previously enjoyed (Altman, 2005, p. 450). It's not only the negotiation advantages that some governments will have to surrender. Many competent authorities have built sound relationships over the years and enjoy a certain level of trust (Altman, 2005, p. 450). Even though the MAP process will still exist it would be governed by an ITO which could result in competent authorities not enjoying the levels of trust previously enjoyed. The competent authorities will also lose the power to deny MAP to taxpayers on the basis of information not provided (Altman, 2005, p. 451). Currently a Competent Authority can simple discontinue the MAP process if the information provided is not deemed adequate, under the ITO such practices will be controlled by a neutral party.

4.4.5.2 Governmental Advantages

It is however the advantages of the institutional design that could enhance the overall success of such a proposal. These advantages are not only enjoyed by the governmental bodies but also tax paying entities involved in tax disputes. The main benefit for all parties will be that of increased compliance (Altman, 2005, p. 454). Even though this is a long term benefit that could follow as governments enter into additional treaties that could ultimately flush out non-compliance, it could ultimately result in the original intention of tax treaties being met i.e. the elimination of double taxation and the facilitation of international trade, without surrendering sovereignty (Altman, 2005, p. 454). In addition Dr Altman suggests that governments will also have the opportunity to protect their residents against excessive foreign taxation without harming diplomatic relationships. If domestic courts work in conjunction with an ITO, governments won't have the option to postpone or avoid compliance (Altman, 2005, p. 454).

The institutional design preserves the MAP procedure but aims to eliminate some of the disadvantages by focussing on the amicable resolutions that can be achieved by this process. Coupling the MAP procedure with domestic legislative procedures should decrease the likelihood of cases being unresolved for long periods of time (Altman, 2005, p. 455). However, it should be noted that Dr Altman's recommendations were provided prior to the OECD reform of the MAP process which introduced time limitations and arbitration. None the less, the recommendation of using a MAP procedure as the first point of call for tax dispute resolution will provide a sense of familiarity to all parties, especially in the outset of such an institutional design. Dr Altman's other suggested advantage is that of arbitration with the main difference to the OECD's introduction in 2008 being that the arbitrators will be fully independent and that the parties may appeal the arbitrator decision with the ITT (Altman, 2005, p. 456). If domestic courts are provided with the option to appeal an arbitration decision it will force arbitrators to make use of correct procedures protecting the rights of all parties through the use of sound logic and legal reasoning. Even the binding nature of the arbitration process conducted through the ITO is beneficial to the governments as the domestic courts can decide whether or not the decision will be binding or not (Altman, 2005, p. 456).

Another benefit provided to both the governmental institutions and taxpayers is the independence and professionalism that's expected from the arbitrators and judges that would represent the ITO in providing tax resolutions. All the individuals representing the ITO through Dr Altman's suggested institutional design would be subject matter specialists with the

required professionalism and expertize (Altman, 2005, p. 457). He is also of the opinion that outsourcing the legal process will enhance the professionalism and legal reasoning of tax treaty dispute resolution (Altman, 2005, p. 457). The use of an ITO will also provide benefits to the governmental legislators in that it will provide them with a quick mechanism to identify potential loopholes within a treaty network (Altman, 2005, p. 458). Both identifying and clearing loopholes are costly and time consuming and this mechanism will aid governments so that they won't be exposed to international taxpayers exposing their treaty network. The use of an ITT to clarify uncertain interpretation (previously leading to double taxation) would also aid all parties, but only if the ITT is able to make use of existing substance-over-form doctrines as suggested by Dr Altman. This insight into legislative interpretation could also enhance future treaty negotiations (Altman, 2005, p. 458).

Furthermore, Dr Altman's institutional design does eliminate one of the fundamental complexities in the current dispute resolution mechanism through which a taxpayer could potentially seek domestic legislative resolution and dispute resolution through MAP (Altman, 2005, p. 458). The OECD suggests that domestic remedies should not be concluded whilst a MAP is being negotiated but the option does exist to continue with domestic litigation if the taxpayer does not accept the resolution. Through the use of an institutional design the uncertainty that domestic courts have in waiting for the MAP results are avoided in totality as the domestic courts remain part of the process (Altman, 2005, p. 459). Wasted costs that arise when a taxpayer rejects the MAP agreement will also be avoided as the taxpayer also incur costs as a result of the legal process (Altman, 2005, p. 460).

The institutional design also evens the playing field between economies that have a higher level of expertise in their negotiation skills (Altman, 2005, p. 459). Developing economies don't necessarily have the expertise or funds to adequately negotiate with more established nations and an ITO as the core of dispute resolution should even the playing field (Altman, 2005, p. 459). Taxpayers with substantial global footprints might also be able to push developing countries' domestic courts into non favourable positions which will also be avoided when an ITO stands at the core of the process (Altman, 2005, p. 460).

4.4.5.3 Taxpayer Disadvantages

Cost is also the core disadvantage faced by taxpayers in that the extent of legal costs through the use of Dr Altman's proposed institutional design will be far greater than the costs the taxpayer would incur under the current process. Yet an outcome based approach could save the taxpayer through alleviating the burden of double tax payments (Altman, 2005, p. 460). Another disadvantage faced by the taxpayer will be its ability to opt out of the process. Previously taxpayers would suffer double taxation if they wish to terminate the dispute resolution procedure but with the institutional design they will also suffer substantial legal fees (Altman, 2005, p. 461).

Dr Altman's institutional design might not be welcomed by all taxpayers as it will involve increased levels of public awareness. Even though all information will be strictly confidential, taxpayers will be aware that any legal procedure could result in leaks of information that could potentially bare reputational risk, not only in the jurisdictions involved but on a world wide scale (Altman, 2005, p. 461). Taxpayers entering into tax planning that involve treaty shopping won't find the use of substance-over-form beneficial at all as their proceedings could be exposed for their lack of commercial rational (Altman, 2005, p. 462)

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4.4.5.4 Taxpayer Advantages

One of the main disadvantages outlined in the current MAP procedure is the lack of transparency (OECD, 2004, p. 3). This is addressed through Dr Altman's institutional design as governments won't be able to turn a blind eye to the procedures of other jurisdictions due to established relationships and will be forced to provide their taxpayers with diplomatic protection (Altman, 2005, p. 463). Taxpayers will also enjoy clarity in interpretation as the use of the ITT will provide all parties with a standardised interpretation of treaty provisions (Altman, 2005, p. 464).

The use of MAP as the first point of call in the institutional design is also beneficial to the taxpayer as the process is familiar and above all more cost effective (Altman, 2005, p. 464). In addition, many of the issues previously raised pertaining to the MAP is addressed through the institutional design providing the taxpayer with transparency, involvement, recourse and above all dispute resolution (Altman, 2005, p. 464). The legal standing that the MAP, arbitration and

ITT review mechanism will enjoy provides the taxpayer with more structure and professionalism in conducting the resolution of disputes but the legal standing will also take away the taxpayers rejection of the outcome (Altman, 2005, p. 466). Ultimately the taxpayer required an outcome that resolves double taxation in a transparent and standardised process but it's the transparency and standardisation that might be both beneficial and detrimental.

4.5 SUGGESTED REFORM

In an ideal world where pragmatism could be ignored, Dr Altman's institutional design would result in an improvement of the current international tax dispute resolution procedures. Unfortunately the pragmatic issues, especially those in relation to sovereignty, cannot be ignored. This study reiterated the advantages and disadvantages enjoyed by both the governmental bodies managing the tax functions of Contracting States and taxpayers (see 4.3.1, 4.3.2 and 4.3.3). I believe that both parties would ultimately benefit if the disadvantages they face were to be limited. Guildemeister (2007, pp. 2, 3) indicated that the main disadvantages of MAP lies in the time constraints provided, the lack of transparency the process entails and more importantly the absence of any legal obligation on the Competent Authorities to reach a conclusion through MAP. In addition the study also indicated that the taxpayer has no way to enjoy official or guaranteed status updates (ICC, 2001, p. 2) together with the taxpayers' limited involvement. However the taxpayers' reservations can be addressed by the addressing the three disadvantages. I therefore suggest the following changes to address these three disadvantages.

4.5.1 Time Constraints

In Chapter 2 this study highlighted the history of international tax dispute resolution and the issue of time constraints seem relevant from the League of Nations distrust in the PCIJ's slow resolution (Altman, 2005, p. 50) to the ultimate perception by taxpayers that the dispute resolution method used by the OECD is a "black hole" never to be resolved (OECD, 2004, p. 4). The OECD tried to resolve the introduction of arbitration in 2007 coupled with the provision of the MEMAP (OECD, 2007a, p. 5). The first annexure to the MEMAP (OECD, 2007b, pp. 45, 46) indicates the ideal timeline of a MAP, from initiation to the point where a decision is reached should be two years. If the Competent Authorities don't reach a resolution the case has

to be submitted to arbitration which has to be concluded within 6 months starting from the date all documentation was submitted (OECD, 2010, p. 386). Implementation of the arbitration decision has to commence within six months. Overall the dispute resolution process can take up to 3 years from the date of submission and if the time taken by the taxpayer to submit a dispute is taken into consideration the dispute resolution process can take up to 6 years. This seems to be too long and even with these timelines intact, there is still no guarantee that it will be resolved within that timeframe.

The use of an international tax body, as suggested by Vito Tanzi (Jones & Brown, 2007, p. 718) and Dr Altman could potentially decrease the time within which resolution is reached but such an ITO cannot be a new establishment as suggested by Dr Altman (Altman, 2005, p. 404). Dr Altman himself suggests that the cost associated with such an ITO is a massive disadvantage (Altman, 2005, p. 460). Another academic, Prof Avi-Yonah (2001, p.9) believes that the OECD could be a leader in actions against tax competition. I believe that tax competition ultimately results in tax treaty disputes and would therefore partially agree with Prof Avi-Yonah that the OECD could be the potential leader in this regard. I would however propose that the OECD not be the sole custodian of this responsibility due to the perception that it remains a "members only" organisation. Due to the history and the extensive work performed on the MAP process by both the OECD and the UN a body that comprises of representation from both organisations could be the most unbiased in performing its duties.

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4.5.2 Transparency

Transparency has been vastly improved since the OECD's MEMAP advised its members to formulate and publicise domestic rules, guidelines and procedures concerning MAP in their country profiles (OECD, 2007b, p. 14). However these rules, guidelines and procedures don't shed any light on the negotiation process and it is within the negotiation where the taxpayer might be of the opinion that Competent Authorities might conspire to reach resolution that might not be in accordance with the treaty i.e. bulk resolution. An example of a bulk resolution would be where two Competent Authorities have to negotiate through MAP on a majority of taxpayers and base their resolution not on the facts and circumstances of each case but on all the disputes as a whole. To maintain sovereignty, which remains one of the main objectives of governments, it won't be possible to make the negotiation process more transparent. As much as it is the taxpayer's right to be taxed in accordance with the convention just so is it the right

of each contracting state to manage its own tax affairs. The commentary to article 25 of both MTC's state that Competent Authorities should "use their best endeavours" to "resolve the case by mutual agreement" but also to resolve it "with a view to the avoidance of taxation which is not in accordance with the Convention" (OECD, 2010, pp. 363, 364). Therefore I believe that it is implied that bulk decision should not be allowed. I would therefore propose that the negotiation process be attended by a representative of the organisation contemplated in 4.5.1, not to be part of the negotiation but to ensure that the negotiated result serves the purposes of "taxation in accordance with the convention".

The fact and circumstances of each case is of the utmost importance and the OECD's MEMAP also indicates that all the information required to reach an amicable conclusion has to be submitted by the taxpayer (OECD, 2007b, p. 14). Taxpayers don't necessarily have the required expertise to address these information requirements and I would therefore propose that the ITO body or representative of both the OECD and UN make it a requirement for taxpayers to seek professional consultation on the submission of information. This will also ensure all the information submitted is in a professional user friendly format which could lead to more favourable turnaround times.

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4.5.3 Legal Obligation

The main disadvantage to the MAP procedure is that there is no legal obligation to reach a resolution for tax disputes submitted by a taxpayer (Gildemeister, 2007, p. 3). This would natural progress from a binding arbitration process but as soon as a third party decision becomes binding on two sovereign states enforcement can't be guaranteed. Dr Altman believes this can be circumvented by initiating the tax dispute resolution process through domestic courts (Altman, 2005, p. 405). I agree with this in principle as the domestic court won't make a binding decision but it could use the MAP resolution in its decision making. There are other avenues explored by Dr Altman for the use of domestic courts such as the use of advisory opinions but I believe the competent authorities should be provided with the opportunity to resolve it through the existing measures without the domestic courts seeking advisory opinions. The question then remains how should MAP be requested if domestic courts can make the decision binding? The current MAP process does not have a legal obligation to reach a resolution but still the Competent Authorities must have the right to exercise their sovereignty through amicable negotiation. If after the periods suggested this process did not reach a

resolution or if the taxpayer does not accept the resolution, the taxpayer should initiate resolution through the domestic courts. The domestic courts can then use the MAP resolution in the legal process.

Even though this might be advantageous the clear disadvantage would be in the form of substantial legal fees. Dr Altman weighs this disadvantage against the potential double payment of taxation (Altman, 2005, p. 460), a saving which may justify the taxpayer's additional expenditure. It is because of this saving that I believe the cost won't necessarily be that big a consideration for the taxpayer. International tax treaty disputes are more often than not within a multinational group and the tax savings from only incurring the expenditure once should far outweigh the legal costs incurred to ensure that right.

4.6 SUMMARY

This chapter provided the reader with a clear indication of the advantages and disadvantages presented by the current MAP process. It is true the introduction of arbitration addressed some of the disadvantages previously identified by both academia and the OECD, but uncertainty still exists as to actual resolution of the disputes in question. The chapter further includes a suggested institutional design developed by Dr Altman in his study on tax treaty dispute resolutions and even if the design does align to the objectives of the parties involved in tax disputes the pragmatism of such a design is questionable. The chapter continued with the identification of the three main disadvantages of the MAP and how those disadvantages could be addressed through proposals a combination of Dr Altman's design and my own suggestions. This study will commence on the overall conclusion on whether or not the MAP as found in both the OECD MTC and the UN MTC has developed in an adequate and effective means to resolve international tax treaty disputes for both the tax administrator and taxpayer.

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CHAPTER 5 – CONCLUSIONS

5.1 INTRODUCTION

International tax treaties are unique bilateral negotiations effectively breaking down the barriers of international trade while aiming to eliminate double taxation and prevent fiscal evasion. The implementation of these negotiated tax treaties is a matter of domestic law, once concluded a contracting state is free to use domestic legislation to tax the income allocated through the these tax treaties. This effectively allows for the continued preservation of sovereignty (Rixen, 2008, p. 8). It was shown by Rixen (2008, p. 22) that there is no external enforcement of these agreements and as a result disputes occur.

The remedy proposed by both the OECD MTC and the UN MTC is what we know as MAP. MAP is a non-binding, non-compulsory dispute resolution mechanism developed in the early 20th century. Even though many jurisdictions remain of the view the MAP is a successful method of dispute resolution, others feel that it has significant shortcomings as outlined by the JWG established by the OECD in 2003. As a result of the work done by the JWG and in an attempt to address some of the insufficiencies of the MAP the OECD introduced additional articles to the MTC including guidelines on non-binding arbitration (OECD, 2007a, p. 4). The UN subsequently introduced similar guidelines in its MTC. The introduction of mandatory arbitration into both these MTCs is the most significant development in the resolution of international tax disputes.

However, the increased complexity and volume of international trade undoubtedly results in tax implications that are not currently addressed in tax treaties or conventions. Differences in the interpretation of the underlying facts of those trade transactions may lead to a host of international tax disputes, often resulting in juridical double taxation. With MAP being the only remedy available, this study aimed to determine whether or not it is most effective international dispute resolution mechanism or whether further developments are still required.

5.2 OBJECTIVES

The first objective of this study was to understand the evolution of dispute resolution. Through the worked performed in Chapter 2, it became evident that since the initial tax dispute

resolution remedy included in Article 7 of the 1899 treaty between Austria-Hungary and Prussia there has been some evolution but that it lacked the development leading to compulsory resolution. Common themes emerged from all attempts at reform ultimately leading to the compilation of the JWG and the formal introduction of arbitration in 2008. The question then remained whether or not the introduction of arbitration provided all parties with enough enhancements in order to address the disadvantages that the MAP entailed. This linked us with the second objective of understanding the MAP as it is available today.

An analysis of the commentary to both the OECD MTC and the UN MTC suggested that the process should, in theory, result in the resolution of international tax treaty disputes. The documentary analysis indicated that the introduction of arbitration does in theory result in a conclusion of tax treaty disputes if Competent Authorities follow the OECDs MEMAP and other guidelines set out in the commentary. These guidelines were developed to provide all parties with clear guidance as to the effective operation and implementation of the MAP. However, the theory has not been tested as the arbitration process is still subject to agreement between parties who are not independent. It remains surprising that the arbitration model as suggested by both the OECD and the UN does not force the independence of arbitrators, a principle which should be at the core of arbitration. But relinquishing independence will mean giving up sovereignty.

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The shortcoming of the MAP process lies in uncertainty. All parties enjoy but limited control during dispute resolution and while taxpayers protect their bottom line and tax administrators cling to sovereignty the objectives of international tax treaties won't be met. This study documents the increase in international trade and with it the increase in the volumes and complexity of MAP cases. The introduction of arbitration and the provision of clarity around best practices will only be a temporary solution at best. The third objective of this study was to determine if the MAP should be adapted further to address some of its inadequacies without sacrificing any of its benefits. This was achieved by the identification of the advantages and disadvantages faced by all those party to tax treaty dispute resolution. The advantages and disadvantages were compared with the objectives of each party to ultimately identify a set of inadequacies. Dr Altman's institutional design was analyses where the documentary analysis of his work indicated that an analysis of the core objectives of dispute resolution is fundamental to the achievement thereof. His design does address the inadequacies without sacrificing the benefits obtained from the current MAP process, however the pragmatism of his design is

questionable. This lead the study towards the suggested reforms of the current process through proposals addressing the main disadvantages of the MAP.

Even though tax dispute resolution underwent the most drastic evolution since it first was suggested in 1899 it is evident that there remains a need for compliance, control and adjudication of the suggestions made by both the OECD and the UN.

5.3 CONCLUSION

The evidence provided in this study suggests that in theory the use of MAP, especially since the introduction of arbitration, could potentially result in the resolution of international tax treaty disputes. What it does not consider is the rapid rate to which the global economy is expanding. If jurisdictions were to ensure that their tax bases are ever growing whilst maintaining the objectives of tax treaties through the facilitation of trade and investment they will have to relinquish some of their control in order to facilitate their own growth. I agree with Dr Altman, Vito Tanzi and Rixen in their suggestion that external enforcement is required.

There is a definite need for an ITO type institution. In my mind Dr Altman's suggested institutional design could be used as a basis for the development of a tax dispute resolution mechanism that could benefit all parties. The pragmatism of this approach remains inconclusive as the implementation of a design as suggested by Dr Altman won't be accepted by all jurisdictions. I therefore made suggested some changes to the current process by adopting some of the principles of Dr Altman's institutional design in an attempt to eliminate some of the pragmatic concerns.

Due to the costs involved and the neutral expertise required I simply cannot foresee the successful incorporation or an ITO consisting of neutral parties. The OECD has been described as a "members only" club but they are the leaders in reform and their members are the jurisdictions that set the pace in economic development. To allow for fair representation I do suggested that the ITO should not consist solely of OECD representatives but also representatives of the UN. This will ensure that both developed and developing countries needs are addressed. Overall this will improve both the time constraints and transparency of the dispute resolution process.

In his institutional design, Dr Altman also suggests that the domestic courts should initiate MAP in an attempt to maintain sovereignty. The MAP resolution will then be used by the courts to make a binding decision. Dr Altman also states that the domestic courts could use advisory opinions drafted by a body of the ITO but I believe the competent authorities should first and foremost be provided with the opportunity to resolve any tax disputes it through the existing measures without the domestic courts seeking advisory opinions. The current MAP is not binding because through it Competent Authorities maintain the sovereignty of the governments they represent. I do however agree that it is required to have some form of legal obligation and therefore this study proposes that if the process of negotiation does not result in a resolution or if the taxpayer does not accept the resolution, then the taxpayer should be allowed to initiate resolution through the domestic courts. The domestic courts can then use the MAP resolution in the legal process.

In conclusion, I believe that the current process is adequate to a certain extent and that the introduction of arbitration did result in the most useful resolution of tax treaty disputes. However as the volumes of MAP cases increase both the OECD and the UN will realise further reform is required because the time constraints, transparency of the process and the lack of any legal obligation will result in ineffective dispute resolution.

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5.4 SUGGESTIONS FOR FURTHER RESEARCH

The field of tax treaty dispute resolution remains open to future developments and further research. Further studies should address the solution to sovereignty, focussing on the retention thereof. Even though Dr Altman's institutional design does allow for the retention of sovereignty, the pragmatism of adapting domestic legislation globally doesn't seem feasible. Further studies should also focus on international enforcement through a neutral third party, especially whether or not current institutions i.e. OECD and UN are feasible candidates to manage this responsibility. Studies could also be focussed on growth patterns in international trade coupled with growth patterns in tax treaty disputes in order to determine if the growing volumes will require a more formal approach. Another enhancement to current studies could be the standardisation of tax treaties to allow for global uniformity.

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